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(104 F.C.C. 2d)

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VOLUME 104 (2d Series)
Pages 1 to 374

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— *Television Deregulation*
MM Docket No. 83-670

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Misrepresentation, Character Qualifications
Spousal attribution permitted for integration purposes where spouses file as joint tenants for estate planning purposes, represent that only one is actual owner, will exercise exclusive control over,

and be financial force behind entire interest, and that other spouse has totally derivative interest. Misrepresentation issue not added where local authority had taken no action on the alleged misconduct.
— *Absolutely Great Radio, Inc.*
BC Docket No. 80-366

Mitigating Circumstances, Generally
Review Board grants renewal applications subject to a condition that assignment applications be filed within 180 days where applicant's severe deterioration of health prevented him from fully defending himself against allegations of wrongdoing, and would likely be aggravated if the proceeding were not terminated. The public interest is served by our action since it will permit a rapid reinstitution of radio service to the communities involved.
— *Calhoun County B/cing Company*
MM Docket No. 84-903

Multipoint Distribution Service
Notice of Proposed Rulemaking adopted seeking to delete both the fifty percent rules, Section 21.903(b)(2), and Section 21.903(b)(1). In addition, Commission intends to permit MDS licensees to choose whether they wish to offer MDS on a non-dominant common carrier basis subject to forbearance or as a non-common carrier.
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FCC rejected the contention of petitioners for reconsideration that the Commission's action deleting the "long" (audit) renewal form for television licensees was taken without sufficient notice. The Commission's reference in the *Notice of Proposed Rule Making* in this proceeding to reassessing its "information needs" in light of its deregulation proposals provided adequate notice of the subject matter to sustain action upon the long form audit.
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FCC denied, as unpersuasive and repetitive, petitions for reconsideration of the Commission's action in its television deregulation *Report and Order* eliminating the nonentertainment programming guidelines for commercial TV licensees.
— *Television Deregulation*
MM Docket No. 83-670

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FCC denied petitions for reconsideration of the Commission's action in its television deregulation *Report and Order* eliminating a comprehensive program logging system for commercial TV licensees. However, the existing illustrative issues/programs list requirement was deleted and replaced with a "significant issue treatment" list requirement. Licensees will now be required to list, each quarter, programs that provided the station's "most significant" treatment of community issues.
— *Television Deregulation*
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(See: Program Logs, Public Inspection of — *Television Deregulation*)

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Notice of Proposed Rulemaking adopted seeking to establish reports that are required to implement enforcement of maximum rate of return prescriptions and some interim reporting requirements for local exchange carriers for monitoring carriers' actual performance on an element-by-element basis. Notice, also, proposes to clarify rate base adjustments that must be reflected both in rate of return reports and cost justification for particular tariffs.
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Rate of Return

(See: Rate Base — *Interstate Rate of Return*)

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(See also: Common Carrier, Domestic — *Domestic Fixed Radio*)

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(See also: Rulemaking, Notice of Proposed — *Interstate Rate of Return*)

(See also: Multipoint Distribution Service — *Multipoint Distribution Service*)

(See also: Education Noncommercial FM Station — *Noncommercial FM Translators*)

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(See: Deregulation — *Receive-Only Earth Stations*)

Site Availability
(See: Amendment — *Progressive Communications, Inc.*)

Stay Pending Appeal
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— *Dorothy J. Owens*
MM Docket No. 85-267

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Misrepresentation, Character Qualifications
Ownership and Management, Integration of

Spousal attribution permitted for integration purposes where spouses file as joint tenants for estate planning purposes, represent that only one is actual owner, will exercise exclusive control over, and be financial force behind entire interest, and that other spouse has totally derivative interest. Misrepresentation issue not added where local authority had taken no action on the alleged misconduct.
— *Absolutely Great Radio, Inc.*
BC Docket No. 80-366

FCC 86-250

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
ABSOLUTELY GREAT RADIO, INC. Ventura, California	BC DOCKET NO. 80-366 File No. BPH-11145
VENTURA BROADCASTING CO. Ventura, California	BC DOCKET NO. 80-367 File No. BPH-781129AH
WILLIAM SHEARER AND ARIKE LOGAN-SHEARER, JOINT TENANTS Ventura, California	BC DOCKET NO. 80-369 File No. BPH-790323AC
For a Construction Permit for a New FM Station	

DECISION

Adopted: May 13, 1986; Released: May 16, 1986

BY THE COMMISSION:

1. Before the Commission for consideration are mutually exclusive applications for authority to construct a new FM station in Ventura, California filed by Absolutely Great Radio, Inc. (Absolutely Great), Ventura Broadcasting Company (Ventura), and William Shearer and Arike Logan-Shearer, Joint Tenants (Shearer). This proceeding is before us on remand from the United States Court of Appeals for the District of Columbia Circuit, which vacated our grant of Absolutely Great's application.[1]

I. Background

2. Both Absolutely Great and Ventura propose that all of its owners will hold full time managerial positions at this station. The third applicant, Shearer, is owned in joint tenancy by William Shearer and his wife, Arike Logan-Shearer, both of whom are Black. Mr. Shearer proposes to serve as the station's full time general manager, and his wife proposes to work 20 hours per week as the station's public affairs director.

3. In an Initial Decision the Administrative Law Judge found that all three applicants were fully qualified but concluded that Absolutely Great was the comparatively superior applicant.[2] Specifically, Absolutely Great and Ventura were credited with 100% full time integration, and Absolutely Great was preferred over Ventura because Absolutely Great's qualitative enhancement credits exceeded those of Ventura. With regard to Shearer, the Administrative Law Judge awarded the applicant 50% full time and 50% part time integration credit because Arike Logan-Shearer, who is a joint tenant, proposed to work part time at the station. He concluded that Shearer ranked behind Absolutely Great and Ventura because a clear quantitative disparity existed between Shearer's integration proposal and those of the other applicants that could not be overcome by the qualitative aspects of Shearer's integration proposal.

4. The Review Board reversed the Initial Decision, granted Shearer's application, and denied the remaining applications.[3] In doing so, the Board credited all three applicants with 100% full time integration, but found that Shearer's integration proposal was qualitatively superior to those of Absolutely Great and Ventura. In awarding Shearer 100% full time integration credit,

[1] *Ventura Broadcasting Co.* v. *FCC*, 765 F.2d 184 (D.C. Cir. 1985).
[2] *Absolutely Great Radio, Inc.*, 92 FCC 2d 1183 (1982).
[3] *Absolutely Great Radio, Inc.*, 92 FCC 2d 1171 (Rev. Bd. 1983).

the Board relied on *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 425–27 (1981), where we indicated that the separate media interests of a husband and wife will be considered commonly for diversification purposes. The Board held that spousal attribution should be permitted for integration purposes in all cases where only one spouse is fully integrated.

5. The Commission reversed the Review Board Decision, granted Absolutely Great's application, and denied the competing applications filed by Ventura and Shearer.[4] It determined that the Board had erred in awarding Shearer 100% full time integration credit. In this regard, we explicitly refused to extend to integration cases the spousal attribution rule set forth in *Klein* for diversification. Since Arike Logan-Shearer proposed to work at the station in a managerial capacity, we found no basis for concluding that her husband would exercise complete control over her interest in the station. Accordingly, we awarded Shearer 50% part time integration credit for Arike Logan-Shearer's proposal to work 20 hours at the station and 50% full time integration credit for her husband's proposal to work at least 40 hours per week at the station. Since both Absolutely Great and Ventura propose 100% full time integration, we found that Shearer's integration proposal was quantitatively inferior to those of Absolutely Great and Ventura. We preferred Absolutely Great over Ventura because its integration proposal was qualitatively superior to that of Ventura.

6. Both Shearer and Ventura appealed our decision to the United States Court of Appeals for the District of Columbia Circuit. By its Opinion of June 18, 1985 the Court affirmed the Commission's determination that Absolutely Great was qualitatively superior to Ventura. It found, however, that the Commission had not adequately explained its decision to award Shearer less than 100% full time integration credit. Accordingly, the court remanded the case to the Commission for further proceedings. By an Order, FCC 85I–114, released August 22, 1985, we afforded the competing applicants an opportunity to file comments addressing the spousal attribution question. Now before us are: (a) Comments, filed September 23, 1985, by Absolutely Great Radio, Inc.; (b) Comments on Remand, filed September 23, 1985, by Ventura Broadcasting Company; (c) Comments, filed October 21, 1985, by William Shearer and Arike Logan-Shearer, Joint Ten-

[4] *Absolutely Great Radio, Inc.*, 95 FCC 2d 1023 (1983), *recons. denied*, FCC 84–120, 56 RR 2d 261 (1984).

ants[5]; (d) Reply Comments, filed November 4, 1985, by Absolutely Great Radio, Inc.; (e) Reply to Remand Comments, filed November 4, 1985, by Ventura Broadcasting Company; (f) Reply Comments, filed November 4, 1985, by William Shearer and Arike Logan-Shearer, Joint Tenants; (g) Petition to Enlarge Issues, filed July 19, 1985, by William Shearer and Arike Logan-Shearer, Joint Tenants; (h) Opposition to Petition to Enlarge Issues, filed August 27, 1985, and supplemented September 6, 1985, by Absolutely Great Radio, Inc.; (i) Reply to Opposition, filed September 13, 1985, by William Shearer and Arike Logan-Shearer, Joint Tenants; (j) Petition to Reopen the Record and Request to Enlarge Issues, filed December 19, 1985, by Ventura Broadcasting Company; (k) Motion to Delete Ventura Broadcasting Company from Caption and to Strike Motion to Reopen the Record and Request to Enlarge Issues or in the Alternative Opposition to Petition to Reopen the Record and Request to Enlarge Issues, filed January 3, 1986, by William Shearer and Arike Logan-Shearer Joint Tenants; (l) Motion to Leave to File Supplement and Supplement to Opposition, filed January 14, 1986, by William Shearer and Arike Logan-Shearer Joint Tenants; and (m) Reply to Opposition to Motion to Enlarge Issues, filed January 21, 1986, by Ventura Broadcasting Company.

II. Proceedings on Remand

7. *Spousal Attribution.* Pursuant to the court's suggestion, we hereby clarify our spousal attribution policy. For the reasons set forth herein we have concluded that Shearer is entitled to 50% full-time/50% part-time integration credit for its proposal that William Shearer devote 40 hours per week and Arike Logan-Shearer devote 20 hours per week to the management of the station, and that there is no need to reopen the record and enlarge the issues. Accordingly, we will grant Absolutely Great's application for a construction permit and deny the competing applications filed by Shearer and by Ventura.

8. The court was troubled by two aspects of our determination to award less than 100% full-time credit for Shearer's integration proposal. First, it found that we had assumed without explanation that legal responsibility is divided 50/50 in joint tenancies. Although the court concluded that this theory of joint tenancies may have been inherent in *New Continental Broadcasting Co.*,[6] it

[5] By Order 85I-139, released October 11, 1985, the time for filing Comments was extended.

[6] 88 FCC 2d 830, 838 (Rev. Bd. 1982), *review denied*, FCC 85-33 (Jan. 25, 1985),

observed that *East St. Louis Broadcasting Co.*[7] must have been based solely on the fact that a joint tenant has an undivided interest in the entire property. It found that the latter theory comported fully with the requirement in the *1965 Policy Statement on Comparative Broadcast Hearings*[8] that participation in station management and legal responsibility coincide. While the court explicitly stated that either theory of joint tenancy might be permissible in this context, it held that we could not simply switch between these theories without explanation. Second, the court criticized our efforts to distinguish previous cases permitting spousal attribution. According to the court, we altered without explanation the approach taken in *New Continental* by concentrating on only one aspect of the "true and actual ownership" analysis — i.e. the question of *de facto* control by one spouse over the joint tenancy.

9. As the court indicated, "the crux of [our] integration calculus is the coincidence of legal responsibility for and actual participation in the station." Consequently, ownership interests held by a husband and wife are ordinarily calculated separately for integration purposes.[9] In several cases, however, we have permitted spousal attribution for integration purposes. We have done this only when the application has been filed by spouses as joint tenants. Our policy was best expressed by Administrative Law Judge Walter C. Miller in *New Continental Broadcasting Company*, 88 FCC 2d 853, at 869, where the spouses jointly owned 51% of the applicant corporation. The ALJ found that the spouses, Mr. & Mrs. Milian, had entered into the joint ownership arrangement for estate planning purposes only and that they had not intended to give Mrs. Milian an ownership interest separate and apart from her husband. In a joint tenancy each spouse has a right of survivorship which assures that the interest of one spouse will pass to the other without having to appoint an executor or administrator. The ALJ found that Mrs. Milian's interest "derives solely from her husband" and that she intended to defer to him on all matters relating to the radio station. The Review Board affirmed the attribution of Mrs. Milian's interest to

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appeal pending, Dadeland Broadcasting Co. v. *FCC*, No. 85-1114 (D.C. Cir. Feb. 21, 1985).

[7] 19 FCC 2d 300, 346 (Hearing Ex. 1969), *aff'd*, 29 FCC 2d 170 (1971).

[8] 1 FCC 2d 393, 395 (1965).

[9] *American International Development, Inc.*, 86 FCC 2d 808, 818, n.54 (1981); *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 428 (1981).

Mr. Milian. 88 FCC 2d 830, 838 (1981).

10. Our intent is to recognize those situations where one spouse is an owner in name only while the other will exercise complete control over the entire joint interest. This policy is not based on any peculiarity of joint tenancy (*i.e.* that each tenant has an undivided interest in the whole). However, because the survivorship attribute of joint tenancies, which is responsive to the estate planning motive, is not found in other forms of ownership we will not attribute ownership in non-joint tenancy situations. Nor do we anticipate attributing ownership in non-spousal relationships where the estate planning motive for forming a joint tenancy is not paramount.

11. To summarize, we will attribute the interest of one spouse to the other for integration purposes where the spouses represent that only one of them is the intended actual owner, that the active spouse would exercise exclusive control and be the financial force behind the joint interest, and that the other spouse is given a totally derivative ownership interest as a joint tenant for estate planning purposes. Also, the inactive spouse cannot participate in the preparation of the application, cannot be proposed to participate in any station activities and cannot assist in funding of the proposed station as a contributor, lender or loan guarantor. These provisions are necessary to limit attribution to the most obvious cases and avoid undue delay of these proceedings. We do not anticipate that future proceedings will require extensive inquiry into the question of attribution. If, however, claims of spousal attribution result in protracted hearing proceedings, we will consider eliminating the policy. It is not in the public interest to extend proceedings — and thereby delay new broadcast services — to delve into attribution questions and we will monitor the next attribution cases to assess whether our instant action has succeeded in narrowing the inquiry sufficiently to allow us to retain the attribution policy as an accommodation to certain husband and wife applicants.

12. Finally, we are specifically rejecting the implications of the holding in *East St. Louis* where the activity or inactivity of the second spouse was not considered in determining whether spousal attribution was warranted. In future cases the second spouse will have to be totally inactive if attribution is to be accorded.

13. The record regarding the Shearers is clear: Dr. Logan-Shearer regards herself as a co-owner and intends to participate in station affairs. In our original action we did not mention that Dr. Logan-Shearer also would be providing funds for the proposed

station. Dr. Logan-Shearer has pledged real estate holdings that she owns independently from her husband as collateral for the bank loan. *See* June 2, 1980 Amendment to Shearer Application for Construction Permit, Second Amended Exhibit 3, "Financial Plan." That omission was not critical because the Shearers' intention that both are to be owners and Dr. Logan-Shearer's active participation in station affairs renders any further inquiry unnecessary. However, Dr. Logan-Shearer's financial involvement would itself provide a reason for not allowing attribution of her interest to Mr. Shearer. Therefore, pursuant to *New Continental Broadcasting Company*, we find that both Mr. Shearer and Dr. Logan-Shearer are owners and that their integration credit is properly based on their individual participation. Since Dr. Logan-Shearer will only be at the station part-time, their integration credit is less than 100% and is insufficient to prevail over the Absolutely Great Radio, Inc., proposal of 100% full time integration.

14. *Motion to Enlarge Issues.* Shearer filed a petition to enlarge issues seeking to add misrepresentation, lack of candor and character issues against Absolutely Great. On April 23, 1985 Absolutely Great's principal, Jim Sylvester, filed a claim for unemployment compensation with the California Employment Development Department which indicated that he was continuously unemployed from December 26, 1984 to April 8, 1985. Shearer submits that this statement contradicts two amendments to Absolutely Great's application, filed pursuant to Section 1.65 of our Rules on January 29 and April 22, 1985, that reported changes in the Sylvester's employment.[10] In view of this apparent discrepancy, Shearer alleges that Absolutely Great has misrepresented the length of Sylvester's unemployment to either the Commission or the California Employment Development Department, and that a misrepresentation issue is warranted under *Scott and Davis Enterprises, Inc.*, 88 FCC 2d 1090 (Rev. Bd. 1982), and *Washington's Christian Outreach, Inc.*, 99 FCC 2d 395 (Rev. Bd. 1984). Shearer also relies upon Sylvester's April 23, 1985 Statement to California Employment Development Department that he and Ad Force's owner, Mr. Frieling, shared equally in the profits of the advertising agency, and regarded each other as partners but that Sylvester did not assume formal ownership of his 50%

[10] The two amendments reflect that Sylvester left Ad Force, Inc. on December 26, 1984, that he became a sales associate with Merrill Lynch Realty on January 18, 1985, and that he became Vice President and Secretary of Ad Communications, Inc. on March 6, 1985.

interest in Ad Force because he did not want to jeopardize his position in this comparative proceeding. Based upon this statement, Shearer surmises that Sylvester was a *de facto* 50% owner and that he intended to acquire the 50% interest in Ad Force as soon as he could do so without jeopardizing his comparative standing in this proceeding. Accordingly, Shearer alleges that Absolutely Great deliberately deceived the Commission when it reported in its August 19, 1982 amendment that Jim Sylvester was employed by, but had no ownership interest in, Ad Force, that this assertion was made to avoid the imposition of diversification demerit, and that a misrepresentation issue is therefore warranted.

15. The California Employment Development Department awarded Mr. Sylvester unemployment compensation. Mr. Sylvester's former employer, David Frieling, appealed the ruling. He alleged that Sylvester had stolen money from Ad Force through abuse of company credit cards and had billed clients for unfinished work. Relying upon *Las Americas Communications, Inc.*, 101 FCC 2d 728 (1985), *Focus Television Co.*, 98 FCC 2d 546 (Rev. Bd. 1984), and *Alan K. Levin*, 97 FCC 2d 1 (Rev. Bd., 1984), Shearer contends that Mr. Frieling's accusations raise serious issues of possible moral turpitude and that a character issue must be added against Absolutely Great.

16. In Opposition Absolutely Great submitted a statement under penalty of perjury from Jim Sylvester which explains that his association with Merrill Lynch Realty and Ad Communications Inc. did not qualify as employment for purposes of making an unemployment compensation claim because he earned no income from either Merrill Lynch or the newly formed Ad Communications during the period in question. Sylvester also denies that he ever had any ownership interest in or control over Ad Force, that there was any understanding or agreement that he would purchase an interest in Ad Force after the completion of this proceeding, and that he stole any money from or otherwise engaged in any illegal or unethical conduct at Ad Force.

17. In its reply Shearer urges that Sylvester's statement contradicts his April 23, 1985 Statement to the California Employment Development Department as well as amendments to Absolutely Great's application, filed January 29, and April 22, 1985, reporting changes in the Sylvester's employment. It maintains that these discrepancies raise a material question of fact as to whether Absolutely Great is guilty of misrepresentation/lack of candor that must be explored in further evidentiary hearings

under *WHW Enterprises Inc.*, 735 F.2d 1132 (D.C. Cir. 1985). Turning to Sylvester's alleged misconduct at Ad Force, Shearer submits that the ruling from the California Employment Development Department did not exonerate Sylvester, but merely found that the dismissal was without cause since Frieling failed to advise Sylvester that his work was unsatisfactory. Shearer contends that Frieling's failure to mention the misconduct in the letter dismissing Sylvester is not evidence that Sylvester did not engage in illegal conduct at Ad Force and that Frieling's allegations must be explored even though the state agency awarded unemployment compensation to Sylvester.

18. We will not add the requested issues against Absolutely Great. As Absolutely Great argues, Shearer's petition to enlarge issues was not timely filed. The facts that Shearer now relies upon could have been discovered well before July 19, 1985, and Shearer has not demonstrated good cause for its filing. Shearer was not entitled to wait until the court acted before it raised this matter. More fundamentally, Shearer has not raised a question of probable decisional significance. It is clear that Sylvester declined to purchase an interest in Ad Force because it might have an adverse effect upon his diversity position in this case. We find nothing wrong with that. It is also clear that the relationship was such that Sylvester might have had an opportunity to buy into Ad Force at some future date. This, too, causes us no concern. What we find dispositive is that Sylvester was clearly not already an owner of Ad Force and had not agreed to purchase an ownership interest in the future. In either of those events, there would have been a responsibility to report. Sylvester's lack of ownership is evident — Frieling fired Sylvester without compensating him for any ownership interest. Nor is there evidence of an agreement between Frieling and Sylvester giving Sylvester the right to purchase an ownership interest at some future date. Therefore, there was nothing incomplete or misleading about Absolutely Great's reporting of Sylvester's position in Ad Force.

19. With regard to the further allegation that Absolutely Great must have misrepresented the length of Sylvester's employment to either the California Employment Development Department or the Commission, we are satisfied with Sylvester's explanation that he earned no income from either Merrill Lynch Realty or the newly formed Ad Communications before April 8, 1985. The amendments filed by Absolutely Great pursuant to Section 1.65 of our Rules, reporting Sylvester's association with Merrill Lynch Realty and Ad Communications Incorporated, are not inconsistent

with Jim Sylvester's subsequent claim for unemployment compensation based on a lack of income during this period. Thus, there is no basis for adding a misrepresentation or lack of candor issue against Absolutely Great.

20. The further claim that Sylvester engaged in illegal and unethical conduct while working for Mr. Frieling at Ad Force likewise does not warrant the addition of an issue against Absolutely Great. By *Report, Order and Policy Statement*, FCC 85-648, 59 RR 2d 801 (1986), we indicated that we are no longer concerned with non-FCC misconduct unless there has been an adjudication by an agency or court, and that adjudicated non-FCC misconduct will not be considered unless it involves (1) fraudulent statements to government agencies; (2) certain criminal convictions; or (3) violations of broadcast related anti-competitive and antitrust statutes.[11] Here there has been no adjudication of misconduct against Sylvester by either a court or an agency. Indeed, the California Employment Development Department did not set aside the award of unemployment compensation to Sylvester based on his employer's allegations of misconduct.

21. *Other Matters.* Ventura submits that the Commission must reevaluate the standard comparative issue in light of *Steele* v. *FCC*, 770 F.2d 1192 (D.C. Cir. 1985), *vacated*, October 31, 1985, which set aside the Commission's policy of awarding credit for female ownership in comparative proceedings. We will not reevaluate the standard comparative issue in this case. The court has already determined that "the Commission's selection of [Absolutely Great] over Ventura was legally acceptable, procedurally adequate, and supported by substantial evidence in the record." Since Ventura did not challenge the policy of awarding comparative credit for female ownership in effect when this case was decided, our original determination that Absolutely Great is comparatively superior to Ventura in this respect is final.

22. ACCORDINGLY, IT IS ORDERED, That the Petition to Enlarge Issues, filed July 19, 1985, by William Shearer and Arike

[11] Even prior to the adoption of our *Policy Statement* on character, we would not have added an issue against Absolutely Great based upon Mr. Frieling's allegation that Sylvester engaged in misconduct while he was employed at Ad Force. In this regard, it had already been our policy not to pursue alleged violations of local law where the authority vested with primary jurisdiction over the matter has taken no action. *Post-Newsweek Stations, Florida*, 57 FCC 2d 1259 (1975); *Bangor Broadcasting Corp.*, 33 FCC 2d 687, 689 (Rev. Bd. 1972).

Logan-Shearer, Joint Tenants IS DENIED.

23. IT IS FURTHER ORDERED, That the application filed by Absolutely Great Radio, Inc. (File No. BPH-11145) IS GRANTED; that the Petition to Reopen the Record and Request to Enlarge Issues, filed December 19, 1985, by Ventura Broadcasting Company, the Motion to Delete Ventura Broadcasting Company from Caption and to Strike Petition to Reopen Record and Request to Enlarge Issues, filed January 3, 1986, by William Shearer and Arike Logan-Shearer, Joint Tenants, and the Motion for Leave to File Supplement, filed January 17, 1986, by William Shearer and Arike Logan-Shearer, Joint Tenants ARE DISMISSED as moot; and that the application filed by William Shearer and Arike Logan-Shearer, Joint Tenants (File No. BPH-790323AC) and Ventura Broadcasting Company (File No. BPH-781129AH) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, Secretary

Complaint, Informal
Rules, Amendment of

Order adopted concerning amendment of Subpart E of Part 1 of Commission's Rules to improve efficiency and clarity of informal complaint procedures and requirements.
— *Amendment of Part 1*

FCC 86-153

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Amendment of Subpart E of Chapter 1 of the Commission's Rules to Improve Efficiency and Clarity of Informal Complaint Procedures and Requirements

ORDER

Adopted April 7, 1986; Released April 18, 1986

BY THE COMMISSION:

1. The Commission, *sua sponte*, has examined its Rules and Regulations concerning informal complaint procedures and requirements[1] in order to improve their clarity and to provide for more efficient and expeditious processing of such complaints.

2. Informal complaints generally have been handled in the following manner: the complaint is served by the Commission upon the affected carrier, which is directed to file a response with the Commission in duplicate within a prescribed time period, indicating whether it has satisfied the complaint or whether it refuses or is unable to do so. After review of the complaint and carrier response and a determination of appropriate further action, the Commission forwards a copy of the response to the complainant, along with a Commission statement indicating whether the response is satisfactory and advising the complainant what

[1] The affected sections of the Rules are set forth in 47 C.F.R. §§ 1.713, 1.716, 1.717, and 1.718.

further remedies are available where it appears that the carrier has not satisfied the complaint.

3. In its present form, Section 1.717 of the Rules, 47 C.F.R. § 1.717, thus requires a two-step notification process regarding carrier action on an informal complaint: the carrier notifies the Commission in duplicate of its resolution of the complaint, and one copy is then forwarded to the complainant by the Commission. This process necessarily results in some delay in informing a complainant of the results of the carrier's investigation and requires that the Commission undertake to provide reports to the complainant which can more efficiently be served directly on the complainant by the carrier. The amended rule therefore requires a carrier to report the results of its investigation directly to the Commission, with a copy to the complainant, thus eliminating this delay and reducing Commission service costs. Due to this direct reporting, we are eliminating the requirement in Sections 1.713 and 1.717 that responses be filed in duplicate with the Commission.

4. In addition, revised Section 1.717 states the circumstances under which the Commission will contact the complainant regarding its review and disposition of the matters raised. The revised rule explains that, where there are clear indications from the carrier's report or from other communications with the parties that the complaint has been satisfied, the Commission has discretion to consider a complaint proceeding closed, without further contact with the complainant. In all other cases, the Commission will contact complainants regarding its review and disposition. We emphasize that, because the determination to close some proceedings without contact may generate confusion and additional contact from the complainant and may not in practice result in the hoped-for decreased need for a Commission response, such discretion will be exercised initially on an experimental basis. If our experience shows that no direct response is needed in specific categories of complaints, we will stop responding directly to these categories of satisfied complainants.

5. Other minor changes to these Rules are being implemented in order to more clearly set forth an informal complainant's available remedies for unsatisfied informal complaints and to clarify the form for filing informal complaints to specify that a complainant should describe the relief desired and provide a telephone number to facilitate contact with complainant. *See* 47 C.F.R. §§ 1.716—1.718.

6. These changes in our informal complaints procedures and requirements will result in more prompt response to complainants. This is part of our ongoing regulatory review process and our experience with these revised rules may indicate that further streamlining may be appropriate in the future.

7. Because the amendments described herein relate to rules of agency procedure and practice, compliance with the notice and comment provisions of the Administrative Procedure Act is unnecessary. *See* 5 U.S.C., § 553(b)(3)(A). For the same reason, the provisions of the Regulatory Flexibility Act are inapplicable. *See* 5 U.S.C. § 601(2).

8. Authority for these rule revisions is contained in Sections 4(i), 208 and 303(r) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 208 and 303(r).

9. Accordingly, IT IS ORDERED that, effective thirty (30) days after publication of these rules and a summary of this action in the Federal Register, §§ 1.713, 1.716, 1.717, and 1.718 of the Commission's Rules, 47 C.F.R. §§ 1.713, 1.716, 1.717, and 1.718, ARE AMENDED as set forth in the attached appendix.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

Subpart E of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

§ 1.713

This section is amended to delete the phrase "in duplicate".

INFORMAL COMPLAINTS

§ 1.716 Form.

An informal complaint shall be in writing and should contain: (a) the name, address and telephone number of the complainant, (b) the name of the carrier against which the complaint is made, (c) a complete statement of the facts tending to show that such carrier did or omitted to do anything in contravention of the Communications Act, and (d) the specific relief or satisfaction sought.

§ 1.717 Procedure.

The Commission will forward informal complaints to the appropriate carrier for investigation. The carrier will, within such time as may be prescribed, advise the Commission in writing, with a copy to the complainant, of its satisfaction of the complaint or of its refusal or inability to do so. Where there are clear indications from the carrier's report or from other communications with the parties that the complaint has been satisfied, the Commission may, in its discretion, consider a

complaint proceeding to be closed, without response to the complainant. In all other cases, the Commission will contact the complainant regarding its review and disposition of the matters raised. If the complainant is not satisfied by the carrier's response and the Commission's disposition, it may file a formal complaint in accordance with § 1.721 below.

§ 1.718 Unsatisfied informal complaints; formal complaints relating back to the filing dates of informal complaints.

When an informal complaint has not been satisfied pursuant to § 1.717, the complainant may file a formal complaint with this Commission in the form specified in § 1.721. Such filing will be deemed to relate back to the filing date of the informal complaint: Provided, that the formal complaint: (a) is filed within 6 months from the date of the carrier's report, (b) makes reference to the date of the informal complaint, and (c) is based on the same cause of action as the informal complaint. If no formal complaint is filed within the 6-month period, the complainant will be deemed to have abandoned the unsatisfied informal complaint.

Character Qualifications
Character Qualifications, Effect of Misrepresentation

FCC modifies Review Board Decision pursuant to recently adopted *Policy Regarding Character Qualifications in Broadcast Licensing.* FCC 85-648, released January 14, 1986, which states that character demerits will no longer be assessed in comparative broadcast proceedings. Winner deserved a slight overall integration preference based on its superior qualitative enhancements.

— *Broadcast Assn. of Colorado*
MM Docket No. 83-1218

FCC 86-215

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
BROADCAST ASSOCIATES OF COLORADO A Limited Partnership Lamar, Colorado	MM DOCKET NO. 83-1218 File No. BPH-821209AC
FM 105, INC. Lamar, Colorado	MM DOCKET NO. 83-1219 File No. BPH-830321AN
For a Constructon Permit For a New FM Station	

MEMORANDUM OPINION AND ORDER

Adopted: April 18, 1986; Released: May 9, 1986

BY THE COMMISSION:

1. The Commission has before it: (a) an Application for Review of the Review Board's Decision herein[1] filed April 18, 1985, by

[1] *Broadcast Associates of Colorado,* 100 F.C.C. 2d 616 (1985) (Board Chairman Marino dissenting).

FM 105, Inc. (FM 105); (b) an Application for Review of the same Review Board Decision filed April 19, 1985, by Broadcast Associates of Colorado (Associates); (c) an Opposition to (b) filed May 2, 1985, by FM 105; (d) an Opposition to (a) filed May 3, 1985, by Associates; and (e) a Motion to Supplement Application for Review filed July 1, 1985, by FM 105. For the reasons which follow, we will modify the Review Board's Decision and grant FM 105's above-captioned application.

2. Associates and FM 105 are applicants for a new FM broadcast station in Lamar, Colorado. Neither applicant has any ownership interest in other mass media and both applicants propose 100 percent integration. The Review Board's Decision herein awarded FM 105 a slight integration preference because of the qualitative superiority of its proposal. This preference was based upon the fact that FM 105's sole owner, Ms. Oxley, is an Hispanic female, whereas Associates' sole general partner, Mr. Yoxsimer, is a white male. However, the Board also assessed a moderate demerit against FM 105 because Ms. Oxley certified that the information contained in FM 105's application was accurate and complete even though, at the time of certification, she had not reviewed or approved the engineering portion of the application. In so doing, the Board reversed an Initial Decision by Administrative Law Judge John H. Conlin (ALJ), which held that this matter had only minor significance.

3. In addition, the Board also noted that during a deposition session Ms. Oxley had given inaccurate testimony concerning the manner in which she had retained communications counsel. Specifically, Mx. Oxley testified that personal friends had referred her to FM 105's current counsel, whereas a friend of her father-in-law had made the referral.[2] Ms. Oxley attributed her

[2] The Board's Decision observed that Associates had claimed that Ms. Oxley lied about how she obtained counsel in order to prevent Associates from obtaining a real party-in-interest issue against FM 105. The ALJ denied the initial request for such an issue, wherein Associates claimed that Ms. Oxley's husband and mother-in-law were the real parties-in-interest because they had given her some assistance in obtaining a transmitter site and her husband had participated with her in negotiating a possible settlement to this proceeding. The ALJ concluded that Ms. Oxley made the final decisions regarding the transmitter site and paid the related expenses. Further, he determined that she was FM 105's spokesperson during the settlement negotiations. *See* FCC 84M-568, released February 2, 1984. We concur with the ALJ's reasoning therein. Associates now seeks review of the Board's failure to grant a similar request to add a real party-in-interest issue concerning her father-in-law as well as her husband and mother-in-law. Associates asserts that Ms. Oxley's father-in-law suggested applying for the FM channel in Lamar (Transcript pp. 31-33) and later lent Ms. Oxley $2,044 to pay her engineering expenses (Tr. 96). In this

false deposition testimony to her state of mind at the time, explaining that she was suffering from fatigue and emotional distress, having returned the night before from a visit with her family in South America, during which an infant niece had suddenly died. In addition, she explained that she felt flustered and intimidated by her surroundings at the deposition session.[3] The Board concluded that this inaccurate testimony, in conjunction with Ms. Oxley's improper certification of FM 105's application, "reflects a rather unfortunate proclivity to dissemble before the Commission." In deciding this case, the Board explained that it would not determine whether FM 105 should be disqualified or merely receive a substantial comparative demerit for Ms. Oxley's misstatements, since FM 105 deserved at least a "heightened substantial demerit." The Board also held that FM 105's heightened substantial demerit outweighed its slight integration preference. Accordingly, the Board declared Associates the winner in this comparative proceeding.

4. Pursuant to our recently issued *Policy Regarding Character Qualifications in Broadcast Licensing (Character Policy Statement)*[4] we no longer assess character demerits in comparative broadcast proceedings,[5] although an applicant can be disqualified

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regard, we note that nobody disputes the foregoing assertions and that Ms. Oxley testified that she repaid the loan from her father-in-law (Tr. 97). As the ALJ stated in his 1984 order (FCC 84M-568), FM 105 has demonstrated that Ms. Oxley has a business and professional career separate from her husband; that she is the owner and operator of a retail clothing store in Lamar; that she filed the application in her own right, and that she is financially responsible for its prosecution. In brief, Associates has not provided a basis for adding a real party-in-interest issue against FM 105, since neither the existence of a family relationship nor the fact of assistance in the prosecution of an application is sufficient to make a *prima facie* showing that another person is or will be in a position to control the operation of the station. *See e.g., KTRB Broadcasting Co., Inc.*, 46 F.C.C. 2d 605 (1974) and *Corvallis Broadcasting Corp.*, 38 F.C.C. 2d 30 (Rev. Bd. 1972).

[3] On the day before the evidentiary hearing session herein was held, she conferred personally with her communications counsel for the first time and revealed her false testimony. FM 105 advised Associates' counsel about her inaccurate testimony and provided the correct information. The ALJ found that these mitigating circumstances rendered the incident insignificant.

[4] *Policy Regarding Character Qualifications in Broadcast Licensing* (Gen. Docket No. 81-500); *Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees* (BC Docket No. 78-108). 102 F.C.C. 2d 1179 (1986). In paragraph 121 of the *Character Policy Statement*, the Commission directed that all proceedings currently before the Commission should generally be resolved consistent with the policies set forth in that policy statement.

[5] In view of the unambiguous language of the *Character Policy Statement* in this regard, we do not accept the suggestion of the Review Board in another

if the record evidence demonstrates that the applicant lacks the basic character qualifications to be a Commission licensee. Thus, the essential question herein is whether FM 105 should be disqualified. After having reviewed the pleadings now before us and the relevant record evidence, we are convinced, as was the ALJ, that FM 105 has the basic character qualifications to be a Commission licensee.

5. The only significant matters relevant to assessing FM 105's character qualifications are Ms. Oxley's improper certification of FM 105's application and her inaccurate deposition testimony concerning her retention of communications counsel.[6] While we do not condone Ms. Oxley's conduct in these matters, we believe that an examination of all circumstances indicates disqualification is entirely unwarranted. With respect to Ms. Oxley's improper certification, both the ALJ and the Board found that the incident did not reflect deliberately misleading behavior and that Ms. Oxley acted on instructions from counsel. Moreover, the ALJ found no evidence that the information covered by the improper certification was itself inaccurate. He also found that Ms. Oxley's testimony at hearing concerning this matter was at all times direct and candid. 100 F.C.C. 2d at 635. As to Ms. Oxley's deposition testimony, we share the Board's concern that she testified falsely as to how she retained her communications counsel. We note, however, that the ALJ, who observed Ms. Oxley's hearing testimony, considered her deposition testimony to be the result of a spontaneous misjudgment made under the trying circumstances of the deposition session rather than a calculated attempt to deceive. 100 F.C.C. 2d at 636. Absent extrinsic evidence to the contrary, we believe that the ALJ's judgment in this regard is entitled to great weight. *WI00, Inc.*, 95 F.C.C. 2d 974, 988-89 (1983). We also note that Ms. Oxley voluntarily disclosed the inaccuracy in her deposition testimony prior to the hearing. *See Fox River Broadcasting Inc.*, 93 F.C.C. 2d 127, 128-29 (1983). Thus, we do not share the Board's view that these incidents reflect a proclivity to dissemble before the Commission. Instead, we agree with the ALJ that they represent isolated instances of misconduct not warranting disqualification.

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proceeding that demerits might still be awarded in some circumstances. *See Professional Radio, Inc.*, 59 RR 2d 1173 (Rev. Bd. 1986) at n.11.

[6] Although Associates argues that Ms. Oxley made certain inconsistent and/or inaccurate statements, in addiiton to her improper application certification and inaccurate deposition testimony, which establish a pattern of deception, we agree with the Board that this contention is wholly without merit. *See* 100 F.C.C. 2d at 622-23.

This case therefore differs from past cases in which applicants have engaged in significant deception which reflects on their willingness to deal truthfully with the Commission.[7] *See, e.g., Nick J. Chaconas*, 28 F.C.C. 2d 231 (1971), *recon. denied*, 35 F.C.C. 2d 698 (1972), *aff'd without opinion*, 486 F.2d 1314 (D.C. Cir. 1973); *Washington's Christian Television Outreach, Inc.*, 99 F.C.C. 2d 395, 398-402 (Rev. Bd. 1984), *rev. denied*, FCC 85-501, released September 16, 1985, *recon. denied*, FCC 86-151, released April 14, 1986; *Country Broadcasting Company*, 93 F.C.C. 2d 83 (Rev. Bd. 1983).

6. In its Application for Review, Associates argues that it should receive a qualitative enhancement preference because its integrated general partner has a physical handicap. We shall reject this argument for the same reasons we have refused to amend our rules and policies to facilitate minority group ownership of broadcast properties so as to include the physically handicapped[8] and have refused to give veterans a preference in comparative licensing proceedings for broadcast facilities.[9]

7. In view of the above and since we concur in the Board's award of a slight integration preference to FM 105 based upon its qualitative enhancements,[10] we hold that FM 105 is the preferred applicant in this case.

8. ACCORDINGLY, IT IS ORDERED, That:

(a) the Application for Review and the Motion to Supplement filed April 18 and July 1, 1985, by FM 105, Inc. ARE GRANTED to the extent indicated herein and ARE DENIED in all other respects; and

(b) the Application for Review filed April 19, 1985, by Broadcast Associates of Colorado IS DENIED.

9. IT IS FURTHER ORDERED, That the Review Board's

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[7] *Compare The Old Time Religion Hour, Inc.*, 95 F.C.C. 2d 713 (Rev. Bd. 1983), *rev. denied*, FCC 85-104, released March 5, 1985, *recon. denied*, FCC 85I-116, released August 27, 1985; *rev. denied*, FCC 86—165, released April 15, 1986.

[8] *Petition of Paralyzed Veterans of America, et al. to Amend Regulations Facilitating Minority Ownership of Broadcast Facilities to Include the Physically Handicapped*, FCC 85-651, released December 16, 1985.

[9] *Petition of Thomas Rockler to Amend the Commission's Award of Preferences in Comparative Licensing Proceedings*, FCC 85-650, released December 16, 1985.

[10] In *Steele* v. *FCC*, No. 84-1176 (D.C. Cir., August 23, 1985), the Court set aside the Commission's practice of awarding preferences for female integration. Recently, however, the Court granted rehearing and vacated the panel's holding in *Steele*. Nevertheless, we wish to emphasize that FM 105 would be the preferred applicant even if it were entitled to no credit for female integration, in view of its preference for minority group integration.

Decision in this proceeding IS MODIFIED as indicated herein.

10. IT IS FURTHER ORDERED, That the application of FM 105, Inc. (File No. BPH-830321AN) IS GRANTED and the application of Broadcast Associates of Colorado (File No. BPH-821209AC) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Mitigating Circumstances, Generally
Proceeding Termination
Renewal, Granted Conditionally

Review Board grants renewal applications subject to a condition that assignment applications be filed within 180 days where applicant's severe deterioration of health prevented him from fully defending himself against allegations of wrongdoing, and would likely be aggravated if the proceeding were not terminated. The public interest is served by our action since it will permit a rapid reinstitution of radio service to the communities involved.

—*Calhoun County B/cing Company*
MM Docket No. 84-903

FCC 86R-34

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Jesse R. Williams, d/b/a CALHOUN COUNTY BROADCASTING COMPANY (WJRL) Calhoun City, Mississippi	MM DOCKET NO. 84-903 File Nos. BR-4829 BR-790202YC BR-820201WM
For Renewal of License	
Jesse R. Williams, tr/as TIPPAH BROADCASTING COMPANY (WCSA) Ripley, Mississippi	MM DOCKET NO. 84-904 File Nos. BR-4402 BR-790202YE BR-820201XV
For Renewal of License	

Appearances

James K. Edmundson, on behalf of Jesse R. Williams; and *Stephen T. Yelverton* and *Linda R. Figueroa*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: May 19, 1986; Released: May 27, 1986.

BY THE REVIEW BOARD: JACOBS, BLUMENTHAL AND ESBENSEN.

BOARD MEMBER ESBENSEN:

1. We have before us an unusual proceeding involving the applications for renewal of license of Jesse R. Williams for two very small market AM radio stations, one in Calhoun City, Mississippi and the other in Ripley, Mississippi.[1] In an *Initial Decision*, FCC 86D-19, released March 21, 1986 (*I.D.*), Administrative Law Judge Walter C. Miller (ALJ) granted the renewal of WCSA (Ripley) and denied renewal of WJRL (Calhoun City). In response to the *I.D.*, the Commission's Mass Media Bureau and Williams have both filed lengthy exceptions urging renewal of both of the licensed stations. Also before us are Williams' Motion for Severance; the Mass Media Bureau's Comments in Support of Motion for Severance; and, Kerry W. Hill's Petition for Extraordinary Relief.

2. If no other factor is clear in this proceeding, it is manifest that Williams desperately wants to separate himself from the two small AM facilities, and from broadcasting entirely.[2] The ALJ's findings (with uncharacteristic understatement) noted that an "additional unfortunate circumstance" has developed over the

[1] We officially notice the records of the Commission which indicate that WJRL operates on 1530 kHz, daytime-only, with an authorized power of 250 watts. The community of license, Calhoun City, had a 1980 population of 2,033. WCSA serves Ripley (with a 1980 population of 4,271) on 1260 kHz, daytime-only, with 500 watts. Both are non-directional; however, the light bulbs for the obstruction lighting on the towers of these stations probably consume more power than the transmitters for these facilities.

[2] We note that, some years ago, Williams had tendered applications to assign both facilities, and his "interest" in a then-pending FM application for construction permit, for a total consideration of only $105,000. That potential transaction disintegrated, apparently, when the proposed assignee learned that he could not succeed to Williams' position in the FM application.

past several years. Specifically:

> Jesse R. Williams' health has deteriorated very badly. His health started going bad in the latter part of 1980. Between January 4, 1982 and February 2, 1982, Williams was operated on four times — twice for malignant cancer. He is totally and permanently disabled; he has had one half of his stomach removed, one kidney [removed] containing a malignant tumor, and a malignancy from his right leg. He has also been treated for bone cancer in his right hip. As of Decmeber 17, 1984, his doctor had Williams under his ' ... care for clear cell carcinoma of the kidney mestastatic to the bone.'
>
> Although on July 1, 1985, Williams testified that his health had improved some (Tr. 208), he was hospitalized again just before the September 9, 1985 field hearing began, this time with a minor stroke and seizure (Tr. 1066-1068). Consequently he wasn't called on to testify further." (I.D., Findings, paras. 12-13).

Both AM stations are now silent. Additionally, Williams notified the Commission in August 1984 (and before he had suffered a stroke and seizure at the 1985 field hearing) that his physician advised "that medical research has proven 'that stress and worry can be a major factor in cancer cells remaining active in humans rather than responding to treatment.' " (Mass Media Bureau Exh. 6, p. 83). More recently, in a letter dated March 27, 1986 (appearing as Appendix A to Williams' Motion for Severance filed April 11, 1986), Williams' physician has further advised that Williams "recently was found to have progression of his bone metastases from renal cell carcinoma and has been treated with radioactive phosphorus."

3. Based on the nature and posture of this proceeding, we believe that no public interest purpose would be served by a continuation of this adjudicatory proceeding. Williams' license renewal for WCSA has already been held in abeyance for ten years. Thus, based upon both equitable and public interest grounds, we will grant the license renewals of WSCA and WJRL. subject to the express condition that Williams file applications for assignment of license for both facilties within 180 days of the release date of this Decision.[3] We emphasize that our instant action is based on the equitable circumstances ensuing from the devastating illnesses of Williams. Thus, for example, Williams was not even able to defend himself at the field hearing in 1985. Furthermore, in the event that his renewal applications were denied, he would unlikely be able to participate in any appeals.

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[3] It is represented that there is a pending assignment application on file (since February 27, 1984) to assign the license of WJRL. If the proposed assignees are still viable and interested after two years, our decision herein will pave the way for an expeditious grant of that application.

Finally, service to the listening public of these two small Mississippi towns would likely be disrupted for an indefinite period. Therefore, we believe that the unfortunate circumstances in this proceeding compel the extraordinary relief applied in similar cases where, *inter alia*, serious illness has prevented an applicant from adequately assisting in his own defense, and such illness would have been aggravated by a continuation of the proceeding. *See, e.g., Tinker, Inc.*, 8 FCC 2d 22, 9 RR 2d 1239 (1967) (AM revocation hearing proceeding terminated on equitable grounds; assignment and transfer applications granted for two stations). The *Tinker* Commission declared:

> We wish to reemphasize that our fundamental policy precluding consideration of assignment applications when the character qualifications of the assignor are in question remains unchanged. See *Jefferson Radio Company, Inc.*, 340 F 2d 781, 2 RR 2d 2090 (1964). Nonetheless, in view of [the applicant's] serious medical condition, the fact that an evidentiary hearing could substantially worsen that condition, and the Bureau's support [for the requested relief], we are persuaded that the public interest would be better served by the termination of this proceeding under circumstances permitting [the applicant] to withdraw entirely from the broadcasting business . . . . (9 RR 2d at 1241).

4. The same result has obtained in numerous other similar situations. *See Martin R. Karig*, 3 RR 2d 669, 670 (1964) (Commission noting licensee's physical disability and holding that "departure from Commission policy is warranted solely because of the unprecedented factor of Mr. Karig's extreme physical disability and its resultant hardship"); *Cathryn C. Murphy,* 42 FCC 2d 346, 28 RR 2d 123 (1973) (renewal granted subject to assignment for health reasons); *Hertz Broadcasting of Birmingham, Inc.*, 57 FCC 2d 183, 35 RR 2d 1452 (1976) (licenses renewed and assignment granted where severe illness prevented principal from participating in a hearing); *Northwestern Indiana Broadcasting Corp.*, 65 FCC 2d 66, 40 RR 2d 1109 (1977) (grant of renewal and assignment application where reading disability detracted from the degree of licensee's misrepresentation in renewal application); and *Lois I. Pingree*, 69 FCC 2d 2179, 44 RR 2d 1233 (1978) (hearing proceeding terminated and construction permit granted subject to assignment based on emotional illness). *Cf. George E. Cameron, Jr. Communications*, 56 RR 2d 825 1984) (settlement approved on equitable grounds).

5. Consistent with the precedent outlined above, we believe that equity and public interest principles mandate a comparable termination of this proceeding. As noted, both WCSA and WJRL are now silent. Our action herein will serve the public interest by

permitting the rapid reinstitution of radio service to the tiny communities of Calhoun City and Ripley, Mississippi by qualified broadcast licensees and by allowing Williams some surcease from his physical and emotional trials. Indeed, the Commission's Mass Media Bureau has strongly urged a grant of renewal of both licenses. In light of the foregoing, a conditional renewal of the licenses for purposes of rapid assignment will patently serve the public interest.

6. ACCORDINGLY, IT IS ORDERED, that the Motion for Severance filed by Jesse R. Williams on April 11, 1986, is hereby DISMISSED as moot; and,

7. IT IS FURTHER ORDERED, that the unauthorized Petition for Extraordinary Relief filed by Kerry W. Hill on May 12, 1986, is hereby DISMISSED; and,

8. IT IS FURTHER ORDERED, that the applications of Jesse R. Williams d/b/a/ Calhoun County Broadcasting Company for renewal of license of WJRL, Calhoun City, Mississippi (File Nos. BR-4829, BR-790202YC, and BR-820201WM) and Jesse R. Williams, tr/as Tippah Broadcasting Company for renewal of license of WCSA, Ripley, Mississippi (File Nos. BR-4402, BR-790202YE, and BR-820201XV) ARE GRANTED with the condition that applications to assign these facilites to unrelated third parties be filed with the Commission no later than 180 days from the date of release of this Decision.

FEDERAL COMMUNICATIONS COMMISSION

ERIC T. ESBENSEN, *Member, Review Board*

FCC 86D-19

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Jesse R. Williams, d/b/a CALHOUN COUNTY BROADCASTING (WJRL) Calhoun City, Mississippi	MM DOCKET NO. 84-903 File Nos. BR-4829 BR-790202YC BR-820201WM
For Renewal of License	
Jesse R. Williams, tr/as TIPPAH BROADCASTING COMPANY (WCSA) Ripley, Mississippi	MM DOCKET NO. 84-904 File Nos. BR-4402 BR-790202YE BR-820201XV
For Renewal of License	

Appearances

James K. Edmundson on behalf of Jesse R. Williams and *Stephen K. Yelverton* and *Linda Figueroa* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: March 14, 1986; Released: March 21, 1986

Preliminary Statement

1. This proceeding ostensibly[1] involves the two renewal applications of Jesse R. Williams. One of the two renewal applications is

[1] The word "ostensibly" has been used because Jesse Williams, by his own admission, concedes that he doesn't seek to operate either of these stations. He seeks renewal only so he can sell the licenses. This will be detailed further under the heading "Background Facts" *infra.*

for WJRL, Calhoun City, Mississippi (1980 population — 2,033); the other is for Ripley, Mississippi (1980 population — 4,271).

2. The Commission, in effect, redesignated[2] the case for hearing on January 3, 1985. See 50 F.R. 1935 published January 14, 1985. The interlocutory pleading cycle has run its course, and the following issues remain to be resolved:[3]

(1) To determine whether Jesse R. Williams, tr/as Tippah Broadcasting Company misrepresented facts to the Commission in connection with the conduct of its community ascertainment survey.

(2) To determine whether Jesse R. Williams, tr/as Tippah Broadcasting Company attempted to fraudulently bill advertising customers of Station WCSA.

(3) To determine whether the programming practices of Jesse R. Williams, tr/as Tippah Broadcasting Company have been discriminatory towards the Black minority within the service area of Station WCSA.

(4) To determine the accuracy of a publication of a notice of hearing of Tippah Broadcasting Company in Southern Sentinel, including the facts and circumstances relating to the nature and extent of participation, if any, of the principals or agents of Tippah in such publication.

(5) To determine in light of the evidence adduced under the above issue:

(a) Whether Tippah Broadcasting Company has complied with Section 73.3594 of of the Commission's Rules; and

(b) Whether Tippah Broadcasting Company has engaged in an abuse of Commission processes.

(6) To determine, in light of the evidence adduced pursuant to Issues (1) through (5), above whether Jesse R. Williams, tr/as Tippah Broadcasting Company, has the requisite qualifications to remain a Commission licensee.

(7) To determine when and under what circumstances Jesse Williams ceased operating WCSA, whether he has failed to comply with 47 CFR 74.1740(a) (4) and 47 CFR 1.65 by not amending his application to reflect a substantial change, and if so, what effect that failure has on Williams' basic[4] qualifications to be a Commission licensee.

(8) To determine whether Jesse Williams is financially qualified to be or remain a Commission licensee.

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[2] The word "redesignated" will be further explained under the section "Background Facts" *infra.*

[3] In an effort to lend some organization and uniformity to this fiasco some of the issues have been reworded and renumbered.

[4] The comparative aspects of Issues 7 and 9 have been deleted. See *Policy Regarding Character Qualifications in Broadcasting Licensing*, FCC 85-648, released January 14, 1986 at paras. 110-113.

(9) To determine whether Jesse Williams has violated 47 CFR 73.3526 by failing to have a completed public file available for public inspection, and if so, what effect that violation has on Williams' basic[4] qualifications to be a Commission licensee.

(10) To determine, in light of the evidence adduced pursuant to the foregoing issues whether the renewal application of Jesse R. Williams d/b/a Calhoun County Broadcasting and/or the renewal application of Jesse R. Williams tr/as Tippah Broadcasting Company (WCSA) should be granted.

In redesignating Issues 1-5 above the Commission ultimately reallocated *both* the burden of proof and the burden of proceeding on the Mass Media Bureau.[5] However, when the Presiding Officer added Issues 7-9, at Kerry Hill's request (and which Jesse Williams did not oppose),[6] he placed both the burden of proceeding and the burden of proof on Williams; i.e., on the person with the first-hand knowledge of the facts and circumstances surrounding those issues. See FCC 85M-860, released February 26, 1985.

3. We held a prehearing conference in Washington, D. C. on April 5, 1985, and hearing sessions on July 1 and 2, 1985. Field hearings were held in New Albany, Mississippi on September 9 and 10, 1985. We then held a posthearing conference in Washington, D. C. on September 24, 1985, and closed the evidentiary record.

4. Jesse R. Williams and the Mass Media Bureua filed Proposed Findings on November 15, 1985, and Williams filed Reply Findings on November 22, 1985. Not surprisingly both parties recommended a grant of both renewals.

Findings of Fact

Background Facts

5. Before one can fully understand the intricacies of this case he or she must become familiar with the bizarre procedural and factual context that forms its backdrop. In the first place at the hearing, we were faced with redeveloping evidence on events that occurred about sixteen to eighteen years ago. We faced the stale

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[5] The Commission's reallocation will be described under the "Background Facts" section.

[6] The bulk of the bizarre problems that we faced in this case can be directly traced to either Jesse R. Williams' penuriousness or his lack of common sense. From the outset and before Judge Tierney, Williams was either too indolent or too miserly to hire a competent communications lawyer to represent him. This resulted in a tragic evidentiary record the first time around, and almost an equally tragic record the second time. Fortunately, and almost belatedly, he finally hired competent communications counsel who was able to partially bail him out of his predicament.

evidence problem because between 1975 and 1985, the Commission refused to deal with the character allegations involved. It shelved them and wouldn't set the matter for hearing.[7] See 50 F. R. 1935 *supra.*, at para. 8.

6. Not only were we dealing with old, potentially stale evidence, but the Commission, for reasons that aren't completely clear, decided to change the way that that evidence was to be adduced. When the initial character issues were first added against Williams back in 1975,[8] the Review Board assigned the evidentiary burdens in the customary manner. It placed the burden of proceeding on the parties that had requested the issues; i.e., for Issues 1-3 *supra.*, on Williams' rival, Kerry Hill, and on Issues 4-5 *supra.*, on the then Broadcast Bureau (now the Mass Media Bureau). But in each instance the Board indicated that the burden of proof would remain on the licensee, Williams.

7. However, ten years later, when the Commission redesignated the issues, it reallocated those burdens. It relieved Williams (the one with the first-hand knowledge of the facts) from making any evidentiary presentation at all.[9] It placed *both* the burden of proceeding and the burden of proof on Hill and the Bureau.

8. This perplexing reallocation of the evidentiary burdens is further complicated since, back in December 1975, certain relevant facts under these issues had already been adduced before Judge James Tierney.[10] See *Country-Politan Broadcasting, Inc.*, FCC 76D-21, released April 7, 1976, at paras. 11, 25, 28-36, 37-42, 43-48, and Footnotes 9 and 12.

9. The picture becomes even more obscure when one realizes that on January 3, 1985, at the very time the Commission was redesignating the old issues, and reallocating the evidentiary burdens, neither of the two broadcast operations involved were even on the air. Williams took WCSA, Ripley off the air on May 12, 1983, and WJRL, Calhoun City off the air on December 5,

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[7] We still don't know why the Commission didn't designate this case for hearing back in 1976 or 1977. But this much is obvious: It can hardly be called regulation's finest hour.

[8] See *Country-Politan Broadcasting, Inc.*, 54 FCC 2d 61, 64, and 57 FCC 2d 92 (Rev. Bd. 1975).

[9] This reallocation is equally mysterious since it was Williams who benefitted most from the ten year delay. He continued to operate both WCSA, Ripley and WJRL, Calhoun City during the ten year period even though his character qualifications were under a cloud.

[10] In its Designation Order the Commission gave absolutely no instructions on how the Presiding Officer was to treat this previously adduced evidence.

1982. Both stations were still off the air when this proceeding was designated for hearings.[11]

10. Subsequent to designation, and after he had hired experienced communications counsel (see Fn. 6 *supra.*) Williams must have realized that the Presiding Judge wasn't going to look favorably on any applicant that would take and would keep his broadcast operations off the air. So at the April 5, 1985 prehearing conference he indicated that he would have WCSA back on the air by mid-April. While he didn't meet that deadline, he was able to put WCSA back on the air on May 22, 1985.

11. However, Station WJRL is another matter entirely. Since he took WJRL off the air on December 5, 1982 because of economic conditions in the Calhoun City area,[12] Williams has never seriously considered putting it back on the air, and will not unless the Commission orders him to do so (Tr. 185, 253, 302, 311, 320).

12. An additional unfortunate circumstance has ocurred during the ten years (1975–1985) the Commission failed to designate Williams' character allegations for hearing. Jesse R. Williams' health has deteriorated very badly. His health started going bad in the latter part of 1980. Between January 4, 1982 and February 2, 1982, Williams was operated on four times — twice for malignant cancer. He is totally and permanently disabled; he has had one half of his stomach removed, one kidney containing a malignant tumor, and a malignancy from his right leg. He has also been treated for bone cancer in his right hip. As of December 17, 1984, his doctor had Williams under his " . . . . care for clear cell carcinoma of the kidney mestastatic to the bone."

13. Although on July 1, 1985, Williams testified that his health had improved some (Tr. 208), he was hospitalized again just before the September 9, 1985 field hearing began, this time with a minor stroke and seizure (Tr. 1066–1068). Consequently he wasn't called on to testify further.

14. Finally, we must make some preliminary findings on the relationship between Jesse R. Williams and Kerry W. Hill. For it

[11] The Commission could have dismissed Williams' Calhoun City and Ripley renewals for non-use. See e.g. *Radio KDAN, Inc. et. al.*, 11 FCC 2d 934 (1968); affirmed *Hansen v. Federal Communications Commission*, 413 F. 2d 374 (1969); *Bonanza Broadcasting Corporation*, 11 RR 2d 1072 (1967); and *Donald L. Horton (KHIP)*, 11 RR 2d 417 (1967). But it didn't.

[12] As previously noted (para. 1 *supra.*) Calhoun City only has a population of 2,033 people.

is this long-standing relationship that lies at the core of our hearing problems.

15. Williams is an experienced broadcaster. He began operating WCSA(AM), Ripley back in 1964. In 1969 Kerry Hill worked as a salesman for WCSA. In October 1972, Hill filed a request for rulemaking with the Commission. He sought to have an FM frequency allocated to Ripley. That request was granted, and on September 17, 1973, the Commission assigned FM Channel 272A to Ripley. See *FM Table of Assignment*, 42 FCC 2d 888. A short time later, on October 31, 1973, under the name of *Country-Politan Broadcasting, Inc.*, Hill filed for that FM frequency. Although he already had the AM station in Ripley (WCSA), Williams filed a mutually-exclusive application for the same frequency on March 4, 1974.[13] It was at that point that the relationship between the two men began to deteriorate.

16. The details of the Williams-Hill feud are meticulously set down in Judge Tierney's Initial Decision in the *Country-Politan* proceeding, FCC 76D-21, released April 8, 1976. They will not be repeated here. But Tierney describes the relationship thus: "The demeanor of Hill and Williams left no doubt that each regarded the other with at least deep dislike." FCC 76D-21 *supra.*, para. 27. However an analysis of those details, along with an analysis of the facts developed in this proceeding indicates that neither Hill nor Williams have acted honorably. In fact their personal animosity for each other has caused them to act unreliably and dishonestly.

17. In *Country-Politan* Hill tried to undermine Williams by submitting to the Commission what has turned out to be certain less than accurate affidavits; he raised baseless fraudulent billing and racial discrimination charges, charges that he knew or should have known had no proper factual foundation; and he gave testimony that Judge Tierney found lacked credibility and was less than candid. Even in this proceeding Hill has made representations that were highly suspect. See the Mass Media Bureau's Petition to Enlarge against Kerry Hill filed on June 28, 1985, and Footnote 2 of FCC 85M-3129 released August 13, 1985.

18. Williams, in turn, lashed back by pressing the prosecution of his meritless application (see Mass Media Bureau's November 15, 1985 Proposed Findings at para. 18, and FCC 76D-21

[13] Moreover, in the *Country-Politan* proceeding Williams never sought any basic qualifying issues against Hill. So from the outset it was clear that Williams was the comparative loser. Thus their exists a question whether Williams' March 4, 1974 application was a "Strike" application.

supra., at para. 7) by commissioning the publication of a false set of hearing issues attacking Hill, and by otherwise systematically and continously abusing the Commission's processes. In brief, and in carrying out their feud, neither Hill nor Williams exhibited the type of candor both the Commission and the public have a right to expect of their applicants and licensees.

19. It is against this factual and procedural background (paras. 5–18 *supra.*) that the facts adduced in this proceeding must be evaluated.

Issue 1 - The False Ascertainment Issue

20. On March 5, 1975, in the *Country-Politan* case, Hill asked the Review Board to add a false ascertainment issue against Williams. He alleged that a survey Williams had purportedly conducted in September 1974, and submitted to the Commission was fraudulent. Hill supported his charge by proffering the affidavits of nine people who stated that neither Williams or anyone at WCSA had surveyed or even contacted them. Some of the affiants challenged other basic facts in Williams' survey. For instance, Williams said that William Lassiter, an employee of Ripley Shoe Products Company, had been surveyed. Lassiter averred that he hadn't been an employee of that Company for two years. Another affidavit, pointed out that the alleged interviewee had been committed to a state mental institution some five months prior to the purported ascertainment interview.

21. After obtaining an extension of time to respond to Hill's allegations, Williams did not do so. Instead, on May 5, 1975, Williams informed the Board that he had filed a "Dismissal of Application and Withdrawal of Appearance" with the Presiding Officer and that he wasn't going to respond to the issue. The Review Board added the issue and set down the allegations that it believed raised "a serious question" of misrepresentation.

22. At this hearing those nine affidavits were offered and received in evidence without any objection from Williams. So, in effect, Williams concedes the nine interviewees were never conducted, and that the information he submitted to the Commission was false. However, he denies any first-hand knowledge of the wrongdoing. Williams claims that he turned the job of conducting that portion of the survey over to his Station Manager, Lewis Davis; that Davis mailed him a list of the persons he (Davis) purportedly interviewed;[14] and that he had not reason to believe

[14] Williams is an absentee owner. He lives in Collierville, Tennesee (suburban

at that time that the information Davis had compiled was erroneous.

23. Williams says that after he received Hill's Petition to Enlarge he confronted Davis with the allegations. Davis still maintained he conducted the interviews. So Williams went to Ripley, confronted Davis with the questionable affidavits, and instructed him to confirm those interviews. Davis said he would, but he never did. Williams further claims that when he discovered that Lewis Davis falsified information he fired him because " . . . I will not tolerate or permit anyone to do so and remain an employee of my business."

24. Lewis Davis testified on the matter at his hearing. He cannot recall doing an ascertainment survey for Williams in 1974, or of Williams asking him about the survey after Hill first raised questions about it. However, Davis says he could not deny it if someone alleged that he actually did the survey.

25. *Intermediate Findings.* It is found that Williams' Station Manager, Lewis Davis was responsible for gathering the survey information that later proved to be false. The original handwritten notes from the disputed ascertainment survey were written by Davis' wife. In addition, and while the survey in question was still in progress, Mrs. Williams, who compiled and typed the survey information, called Lewis Davis for further details and he confirmed to her that he had conducted the disputed interviews. So, contrary to his sworn testimony that he can't recall conducting the disputed survey, he has admitted to Mrs. Williams that it was he who gathered the disputed data.

26. The Mass Media Bureau argues that Williams should not be held accountable for the ascertainment falsifications that Lewis Davis forwarded to him and which Williams, in turn, submitted to the Commission. The Bureau even goes so far as to suggest that Lewis Davis was in cahoots with Kerry Hill to do Williams in. This argument is rejected. A principal is responsible for the acts of his agent performed within the scope of his employment. Williams was an experienced broadcaster at the time. He had been on the air since 1964. He knew the importance the Commission placed on ascertainment survey information. He assigned part of this important survey work to his number one employee, his station manager, Lewis Davis. Davis had been his station manager at WCSA since Williams had commenced operations in 1964. Williams must certainly take the responsibility for

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Memphis), about 60 miles from Ripley.

that type of an agent. To rule otherwise would make a mockery of the law of agency.

27. The Bureau describes Davis' actions as being "unexpected and disloyal." While there is some circumstantial evidence that suggests that Davis may have cast his lot with Kerry Hill, and was bent on getting Williams' application denied, it is just that — circumstantial evidence. And those circumstances are not strong enough to permit a conclusion that there was a Hill/Davis conspiracy against Williams. Williams himself evidently has never been seriously bothered by Davis' falsifications. For although the purportedly fired Lewis Davis for falsifying information (see para. 23 *supra.*), he later rehired Davis on two separate occasions[15,16] (Williams/Mass Media Bureau Joint Ex. 1). So the intermediate finding is warranted that Jesse Williams misrepresented facts to the Commission in connection with his September 1974 ascertainment survey; and that when accused of making such misrepresentations he refused to respond, and instead indicated he would dismiss his then pending FM application and withdraw his appearance.[17]

Issue 2 - Alleged Fraudulent Billing

28. On March 5, 1975, in the *Country-Politan* case, Hill asked for fraudulent billing issue against Williams. He claimed that Williams had tried to fraudulently bill WCSA(AM)'s advertisers by giving them less time than he actually paid for. In support Hill submitted the affidavit of Jimmy Dale Hunsucker, a former WCSA employee.[18] Hunsucker claims that in early 1971, Williams personally instructed him to "juggle spots" so that "if a merchant or business man had paid for 100 spots, merely give him 75."

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[15] Lewis Davis was a Ripley resident. So he had something that absentee owner Williams needed — local advertising contacts. So it is apparent that while Williams may have been concerned about Lewis Davis falsifying information, that concern was secondary to selling advertising on WCSA.

[16] Mrs. Williams claims Mr. Williams rehired Davis because we " . . . can never hurt anyone who comes to us with a sob story . . . " (Tr. 1048) Maybe so. But this personality trait hardly comports with a person who files a sure-loser FM application on top of a prior filed application.

[17] Later he even tried to renege on this promise.

[18] Hansucker worked for WCSA from 1970 to 1971 as an announcer and part-time salesman. He had then and still has a strong personal animosity toward Williams. He has been employed by Hill at WTXI(FM) since Hill went on the air in June 1979.

29. At the 1985 hearing it developed that this charge was not only false, there was no and never had been any basis for the charge. Not only did Hunsucker admit that critical portions of his affidavit were inaccurate,[19] but the testimony of other key employees who worked for WCSA at the time indicated that no fraudulent billing ever took place, and Williams never instructed any of them to defraud any local merchants.[20]

30. What actually happened was this. Jesse Williams decided to increase WCSA's advertising rates. He instructed Lewis Davis, his station manager, to increase the rates and have new rate cards printed. Thereafter Lewis Davis reported back to Williams. He told Williams that Hunsucker was unhappy with the rate increase because he (Hunsucker) thought he would lose money. This puzzled Williams because Hunsucker, a part-time salesman, only had fourteen accounts and had only earned $221.19 in commissions in 1970 and $208.83 in 1971. So Williams told Lewis Davis that he (Davis) could handle the rate increase in two ways. Either the station would reduce the number of spots per month, and the advertiser would pay no more money, or the advertiser could keep the same number of spots and pay the higher rate.

31. *Intermediate Findings.* Based on the foregoing (Findings 28–30 *supra.*), the following intermediate findings are warranted: the charge that Jesse R. Williams tried to fraudulently bill WCSA's advertising customers is utterly baseless and Issue 2 should be resolved in Williams favor.

Issue 3 - Discriminatory Programming

32. On March 5, 1985, Hill asked for a discriminatory programming issue against Williams. He alleged that WCSA (Williams) had discriminated against the Black population of Ripley and Tippah County by failing to air public service announcements that members of the Black community had requested. In support Hill submitted the affidavits of two individuals, Jimmy Dale Hunsucker[21] and Billy McCall.

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[19] For example, in his affidavit Hunsucker swore that Williams had *personally* told him to defraud local advertisers. But at the 1985 hearing he changed his story and said that Williams had instructed Lewis Davis, the station manager, to defraud the local advertisers, and Hunsucker had overheard that conversation.

[20] The then station manager, Lewis Davis, so testified; Oleta Jones, then the station secretary, so testified; and Wayne Davis, who worked at WCSA at the same time Hunsucker did, so testified.

[21] See Findings 28–29, and Footnotes 17–19 *supra.*

33. Hunsucker, and ex-WCSA announcer, says that while he was a WCSA employee, Williams emphatically instructed him to write down and log Black obituaries for Black decedents that were called into the station by a Black funeral home, Foster and Son, but not to read them on the air. Hunsucker also swore that, pursuant to Williams' instruction, on one occasion he didn't read a public service announcement relating to an urgent meeting of a local Black organization.

34. Billy McCAll, a former WCSA disc jockey, averred that J. R. Williams specifically instructed him " . . . not to put anything on the air concerning Black community . . . ."

35. In preparation for the 1985 hearing Hill also submitted two affidavits of Ray Sartor who was then the Tippah County Agricultural Agent; an affidavit given by a former WCSA announcer, Jim A. Lindsey on March 25, 1976, and referring to events that purportedly took place in the late summer of 1965; and a Discovery deposition of Lewis Davis taken on October 27, 1977. All of these documents are materials prepared for a civil suit that Jesse R. Williams (Plaintiff) brought against Kerry W. Hill, Ray Sartor, James Dale Hunsucker, and Billy McCall in the United States District Court for the Northern District of Mississippi, Eastern Division.[22]

36. Defendant Ray Sartor's two affidavits were taken in 1975 and 1977. In his June 9, 1975 affidavit, he refers to an incident where his Associate Agricultural County Agent, James F. Clarke, a Black, was barred from broadcasting agricultural programs on WCSA during 1965-1966.[23] According to Sartor, Lewis Davis (WCSA's Station Manager) said this in effect: "Ray, I hate to do this, but Mr. Williams of Collierville doesn't want any negroes on his radio station, including James Clarke. Mr. Williams is very adamant about this, and said that he didn't want any damn negroes on his radio station, that he didn't have any negro advertisements, didn't solicit any, didn't want any . . . " and that Williams had ordered Lewis Davis to so inform Sartor.

37. In the same affidavit, Defendant Sartor also describes an event that occurred about two years after the James Clarke incident. Sartor says he observed WCSA disc jockey, Jim Lindsey, turn the power so low on a Black oriented agricultural

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[22] No mention was made of this suit during the 1985 hearing. So it is not clear if this case ever came to trial, if it was settled or if it was dismissed. In any event, it shows how badly the Williams-Hill relationship had deteriorated (see Findings 14-19 *supra.*) and the steps each was willing to take in attacking the other.

[23] Keep in mind that we're now dealing with events that are 20 years old.

program that it could not be heard. Sartor says he asked Lindsey why he had done this, and Lindsey stated that it was Mr. Williams' position that he [Williams] may not be able to prevent Negroes from presenting programs, but he could certainly keep them off of the air by turning the power off. Sartor's October 31, 1977 affidavit essentially reiterates what he said in his 1975 affidavit.

38. Reverend Jim A Lindsey, in his March 25, 1976 affidavit, swears: "That during the time of my employment [1965-1966] at WCSA, I was told by Mr. Lewis Davis, the manager of WCSA, that Mr. Williams had directed that no black be permitted to put any program on the air, and that if a black came, or if a tape made by a black was offered, that the volume of the station should be cut down to an extent that it could not be heard further than a very short distance . . . In fact Mr. Davis stated that he did not want any record of any music or anything else produced by a black to go on the air . . . " Lindsey also corroborated with the incident Ray Sartor described in his June 9, 1975 affidavit (see Finding 37 *supra.*)

39. At his October 27, 1977 deposition, Lewis Davis corroborated Ray Sartor's version of the James Clarke incident (see Finding 36 *supra.*) The following colloquy took place between Davis and Mr. Fred Smith, Sartor's lawyer:

> "Q. Just what did Mr. Williams tell you?
>
> A. . . . So I called Mr. Williams, and he wanted to know what this Black man was doing on the radio. And I told him that he works with Ray Sartor. He is part of Ray's extension staff . . . and it was his day to do the program . . . He instructed me to go to Mr. Sartor and tell him he didn't want him on his radio station . . . because they didn't buy advertising . . .
>
> Q. That who didn't buy advertising?
>
> A. The Black people didn't buy advertising, and he didn't want them on. . . . "

40. Williams denies ever giving Hunsucker, McCall, Lewis Davis, or any station employee instructions not to broadcast Blacks, or Black-oriented programming, and specifically Black obituaries. He also denies instructing Jim Lindsey in 1965-67 to turn down the volume of a program being presented by a local Black community group. Regarding the James Clarke incident, Williams points to a commendation letter Sartor sent WCSA on March 27, 1967. There Sartor praised WCSA for its cooperation and support in the broadcast of USDA agricultural programs. As

a result of Sartor's recommendation, WCSA was awarded the "Outstanding Agricultural Contribution Award" by the Mississippi Broadcasters in May 1967. In addition, Williams points out that about a year later, Clarke started presenting agricultural programs again and continued to do so on a regular basis.

41. The following additional facts were developed at the 1985 hearings. Lewis Davis testified that other than the two USDA programming incidents in the mid-1960's (Findings 36–37 *supra.*) he knew of no other discriminatory programming practices at the station. Davis says that the James Clarke incident was the only time Williams ever instructed him not to broadcast Blacks or Black-oriented programs. Davis denies ever giving Hunsucker, McCall or anyone instructions not to broadcast Blacks or Black-oreinted programming or Black obituaries in particular.

42. Hazel Foster testified on Williams' behalf. Ms. Foster, a Black woman and Ripley resident, owns the Foster funeral home (Finding 33 *supra.*), a cosmetology college, a motel, a laundromat, and a recreation center, all located in Ripley. She has lived in Ripley for 30–40 years and has been active in the local NAACP from 1964 to 1982. During that time she was not aware of any discriminatory programming practices going on at WCSA. She says that if anything like that had been going on she would have heard and done something about it. Since the station first went on the air back in 1964, WCSA has broadcast advertisements for her businesses including Black obituaries. She would either telephone the material or personally carry it to the station, and was never refused. Further she has heard the announcements broadcast that she sent in. Finally, she says, that in 1975 Williams hired two Blacks to work at the station whom she had recommended.

43. Wayne Davis, currently a WCSA employee, testified on Williams behalf. He started working for the station in 1968, and was working there in 1975 when Hill filed his Motion to Enlarge Issues. During that time period Station WCSA(AM) broadcast: Blacks and Black-oriented programming; Black obituaries and public service announcements for Black churches and civic groups; and Black gospel music, both live and recorded. Moreover, between 1968 and 1975 Wayne Davis recalls James Clarke regularly coming to the station to present a USDA program. Wayne Davis also says that neither Williams, or Lewis Davis or anyone ever instructed him not to broadcast Blacks or Black-oriented programming.

44. Both Jimmy Dale Hunsucker and Billy McCall were cross-examined at the 1985 hearing. Hunsucker maintains that about two weeks after he started working at the station, Williams personally told him not to broadcast anything concerning Blacks because they didn't listen to the station, and more specifically told him not to broadcast any Black obituaries for Foster's Funeral Home, but nevertheless, to log them as if they had been broadcast.[25] He claims he followed that instruction throughout his term of employment. However, Hunsucker does admit, contrary to his affidavit, that Williams never *personally* instructed him not to read a public service announcement relating to an urgent meeting of a local Black organization. Hunsucker also admits, contrary to his affidavit, that Williams never instructed other employees in his (Hunsucker's) presence not to broadcast Blacks or Black-oriented programming. Hill's attorney drafted his affidavit, and Hunsucker admits that its wording creates an inaccurate impression.

45. Similarly, Bill McCall's affidavit unequivocally states that Williams specifically instructed him not to broadcast anything about the Black community. But now McCall is not sure whether it was Williams who actually so instructed him. He now believes that Lewis Davis may have given him these instructions. Moreover, McCall now admits that he gave false testimony at the 1975 hearing about how his affidavit came into being. He says Hill sought him out and asked him to help Hill on the FM application not vice versa.[26] He regrets that he ever signed the affidavit for Hill and got involved in this proceeding.[27]

46. *Intermediate Findings.* Based on the foregoing (paras. 32-45 *supra.*) some intermediate facts on the discriminatory programming issue are warranted. It appears that when Williams went on the air in the mid-1960s, and when it was still fashionable in the Deep South, to overtly discriminate against Blacks, he tried to clothe WCSA with a lily-white image. He

[24] Both testified before Judge Tierney in 1975. See *Country-Politan Broadcasting, Inc.*, FCC 76D-21 released April 8, 1976 at paras. 11, 25, and 30-42. Their affidavits were resubmitted for the 1985 hearing. See Findings 32-34 *supra.*

[25] This testimony doesn't make sense since Hunsucker acknowledges, that as a matter of station policy, White obituaries which were broadcast, were never logged (Tr. 611-613).

[26] McCall now believes that back in 1975 he was "used" by Hill and Lewis Davis (Tr. 874-888).

[27] At the time he gave his 1975 affidavit, McCall harbored ill-will toward Williams. Williams had fired McCall ostensibly for drinking on the job.

played the game.[28] The James Clarke and Jim Lindsey incidents attest to that. The Presiding Officer has no reason to doubt Ray Sartor's and Jim Lindsey's affidavits about those incidents. Nor does he doubt Lewis Davis' October 27, 1977 deposition testimony. However, the record is equally clear that even then (in the 60s) that there was no visible pattern of programming discrimination. If there had been, Hazel Foster, a Black business woman, a member of the local NAACP, and a long-time Ripley resident, wouldn't have had her funeral announcements, and her business advertisements broadcast. Nor would she have testified as she did in this proceeding.

47. Moreover, it is equally clear that by the late 60s and early 70s, as overt discrimination began to be less acceptable, Williams no longer sought to portray WCSA as being in the all-White column.[29] The record shows that WCSA broadcast Blacks, Black-oriented programming, Black obituaries, public service announcements for Black churches and civic groups, and Black gospel music, both live and recorded.

48. In summary, and when all the evidence, pro and con, on the issue is considered, the finding is warranted that Jesse Williams' programming practices have not discriminated against the Black minority[30] within Station WCSA's service area.

Issues 4 and 5 — False Publication and Abuse of Process

49. These issues were added as a result of a Motion filed by the Bureau on October 10, 1975. There the Bureau pointed out that Williams, instead of publishing the issues set out in the Designation Order, published a completely false set of issues of his own making. Williams defended saying he had tried to comply with the Commission's publication rules but had been hindered by difficulties with his attorney. The Bureau replied that Williams was an experienced broadcaster, that he had conducted most of

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[28] This record shows that Jesse Williams is many things. But he is not a racist, and Kerry Hill's use of McCall and Hunsucker to try to portray him as such is deplorable. It is just another example of the ends these two men went to in their attempts to discredit each other.

[29] However, it is interesting to note that later, on May 3, 1976, the Mississippi State Branch of the NAACP *et. al.* petitioned to have the renewal applications of 86 Mississippi stations denied. Among them were both of Williams' operations; i.e., WJRL and WCSA. The NAACP raised employment discrimination charges, along with other violations against both stations. Nothing ever came of it. See *License Renewal Applications of Certain Broadcast Stations Licensed for and Serving the State of Mississippi*, 59 FCC 2d 1335 (1976).

[30] Ripley and Tippah County has a 15 percent Black population.

his Commission-related affairs on his own without counsel; that the Commission's rules give explicit and unmistakable instructions on how issues are to be published; and that, in any event, lack of counsel cannot justify serious misconduct of this nature. The Review Board credited the Bureau's position and added the issues it had requested.[31] See *Country-Politan Broadcasting, Inc.*, 57 FCC 2d 92 (1975). In so doing it said: "Such a use of the Commission's publication requirement to convey inaccurate and misleading informaton not only casts doubt on Tippah's good faith compliance with this requirement but also raises substantial questions as to whether Tippah has misused and thus abused the Commission's procedures."[32]

50. The Commission's Designation Order in the *Country-Politan* case specified a funds availability and ascertainment issues against Williams along with the standard comparative and conclusory issue. See 40 F.R. 7006, published February 18, 1975. There were no basic issues designated against Williams' opponent, Kerry Hill. When the March-April 1975 publication time came around Harold Seligman, Williams' lawyer,[33] sent him a copy of the Designation Order.

51. Williams didn't publish the Commission's hearing notice as written. Instead he composed one of his own. First he removed the basic qualifying issues that had been designated against him. Then he fabricated two basic qualifying character issues against Kerry Hill. He drew up a financial lack-of-candor issue that suggested that Hill had failed to disclose all of his financial liabilities to the Commission. He then followed this up by composing an issue "To determine if the applicant's sole intention is to use this license to further enhance his position as Mayor of Ripley, Mississippi." Kerry W. Hill, Country-Politan's sole stock-

[31] Finding 49 is included because the Bureau, in this 1985 hearing, has done a complete flip-flop. It has completely reversed its position even though no new facts have been adduced.

[32] In its Proposed Findings filed November 15, 1985, the Bureau says that "[a]t the time, Williams was unrepresented by counsel . . . . " See Finding 75 at page 39, lines 3-4. The Presiding Officer believes that this finding doesn't accurately reflect the state of the record.

[33] Whether Williams ever supplied the Commission with evidence of his bogus publication is open to dispute. *Compare* 57 FCC 2d 92 (para. 2) with 57 FCC 2d 92 (para. 3). But, *assuming* that Williams was proceeding without the help of Harold Seligman, it is highly doubtful that he ever mailed an original and the necessary copies of the publication to the Commission.

holder, was then and is now the Mayor of Ripley, Mississippi.

52. Williams had his bogus Designation Order published in the *Southern Sentinel* on March 27, April 3, and April 10, 1975. The *Southern Sentinel* was at that time a weekly newspaper in Ripley, Mississippi.

53. When he was called to task, Williams first explained that his false notice resulted from a lack of assistance from his attorney, and a belief that this was the proper way to specify issues in a comparative proceeding. He said that what he did was stupid and when he realized his mistake he apologized to all parties concerned.

54. However, at another point, Williams offered a very different reason for the false publication. He says he published the bogus issues because " . . . Mr. Hill was circulating by word of mouth and by submitting affidavits to the Commission defamation of character and derogatory statements about me[34] and since I did not have legal counsel to advise me (nor did I realize how important legal counsel was to become) . . . . "[35] It is the second reason; i.e., that Williams published the false issue to strike back at Hill that will be credited.

55. Williams perceived that Hill was defaming him, and he lashed back in return. In so doing he not only improperly attacked another's character, he falsely suggested that the Commission had accused his opponent of concealing financial information and of seeking a broadcast license solely to enhance his political interests. The Mass Media Bureau may be willing to accept Williams' apology for such conduct, but the Presiding Officer isn't. He agrees with the Bureau's and the Review Board's 1975 observations (Finding 49 *supra.*). Such conduct is inexcusable. The Commission's adjudicatory processes are to be used for getting disputes resolved, not for gutter fighting.

56. Moreover, Williams not only authored and published issues unjustly attacking his opponent, he deleted the basic qualifying issues against himself. So his false publication had a twofold objective; i.e., to falsely defame his opponent and at the same time to falsely make himself look good.

57. Williams says he made a mistake because he didn't have legal counsel to advise him (Finding 54 *supra.*), and the Bureau describes Williams as being " . . . sincerely repentant for his past

[34] The Hunsucker and McCall affidavits *supra.*

[35] Even as he was making his statement on February 21, 1985 (see Mass Media Bureau Ex. 7), Williams was without counsel. James K. Edmundson didn't enter his appearance for Williams until April 1, 1985.

actions . . . ." This position is rejected. It is totally inconsistent with the facts of record.

58. If, in 1975, Williams regretfully realized that he had abused the Commission's processes and that the abuse resulted from a lack of counsel, why did he continue his abuse for a substantial part of this 1985 hearing? The Designation Order was released on January 3, 1985. Williams continued to represent himself for the next three months. It wasn't until April 1, 1985 that Williams' counsel entered an appearance.

59. During that three month period, Williams continued to abuse the Commission's processes just as he had done in 1975.[36] He filed unauthorized letters and telegrams. See FCC 85M-550 released February 6, 1985 and FCC 85M-1140 released March 19, 1985. He refused to file responsive pleadings on numerous occasions including a response to a Motion to Dismiss his application. See e.g. FCC 85M-860 released February 26, 1985; FCC 85M-892 released March 1, 1985; and FCC 85M-1344 released March 29, 1985. He filed incoherent pleadings. See FCC 85M-1220 and FCC 85M-1222, both released on March 22, 1985. And he attempted to improperly bring congressional pressure on the Presiding Officer. See FCC 85M-1344 released March 29, 1985. In fact, it wasn't until after the Presiding Officer described Williams conduct as being "willful, repeated, and in bad faith" that Williams secured communications counsel. That isn't sincere repentance. It isn't repentance at all.

Issue 7 — Williams' Failure to Operate WCSA and WJRL

60. On February 4, 1985, Kerry Hill filed a Motion to Enlarge against Williams, and one of the issues he sought was an inquiry into the circumstances that caused Williams to take WCSA, Ripley off the air. The Mass Media Bureau supported the addition of that issue. Williams never bothered responding to Hill's request. So the Presiding Officer partially granted the unopposed motion. See FCC 85M-860 released February 26, 1985.

61. Neither Williams, Hill nor the Bureau ever mentioned that Williams had also taken his other station, WJRL, at Calhoun City off the air. The Presiding Officer discovered this fact while

[36] It must be remembered that Williams had a full opportunity to address these issues in the 1975 FM proceeding. But rather than do that he dismissed his FM application. So while the Commission may have been dilatory in sitting on Williams' character issues for ten years it cannot be said that he didn't have a previous opportunity to address them.

preparing for the trial.[37] See FCC 85M-1344 released March 29, 1985; and FCC 85M-2091 released May 14, 1985.

62. *WJRL.* As previously noted (Finding 9 *supra.*) Williams took WJRL off the air on December 5, 1982. He did so " . . . due to the economical situation of Calhoun County, Mississippi."[38] Later, at the 1985 hearing, Williams gave a different reason. He said he did so because his health had deteriorated. See Findings 12-13 *supra.* Then he offered still a third but totally unsubstantiated reason; i.e., that a woman he had working for him at WJRL was embezzling money from him. In any event, the station has been silent over three years, Williams has never seriously considered putting WJRL back on the air, and openly states that he will not do so unless the Commission orders him to do so.[39]

63. *WCSA.* On May 12, 1983, Williams took WCSA, Ripley off the air. He did so because he had reached an agreement to sell WCSA to Kerry Hill.[40] He claims he telephoned someone in the AM Facilities Division on May 17, 1983, and advised them of what he had done, and that he confirmed this conversation by a letter dated May 18, 1983. However, he never proved this claim to the Presiding Officer's satisfaction.

64. Hill later terminated the sales contract on November 1, 1983. But Williams took no steps to put WCSA back on the air. As previously noted, until April 1, 1985, Williams has either not been represented by counsel or could not readily obtain the assistance of counsel. He says he wasn't aware of any particular procedure for keeping a station silent. He purportedly believed he was authorized to keep his station silent until he found a buyer.[41]

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[37] It is downright eerie when the parties to a proceeding leave it up to the Presiding Officer to discover vital and decisionally significant facts. It is the adversarial process that should uncover, explore, and develop such facts.

[38] It should be noted *infra.*, that Williams is financially qualified to operate both WJRL or WCSA. So he wasn't terminating service to the public for financial reasons.

[39] Even if there were no other issues in this proceeding, the Presiding Officer cannot and will not grant Williams WJRL renewal. For a financially qualified licensee to show such an abject and calloused disregard for the listeners in his service area is unpardonable. The Presiding Officer couldn't in good conscience grant Williams' Calhoun City renewal.

[40] Surely, as an experienced broadcaster, Williams knew that he couldn't sell WCSA while he still had the 1975 character allegations hanging over his head, allegations that he had deliberately walked away from in 1975. *Jefferson Radio Co.* v. *FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964).

[41] However, this doesn't make sense either. For even after he located a prospective buyer he didn't put WCSA back on the air.

65. However, after he retained communications counsel on April 1, 1985, Williams either was advised or came to realize that the Presiding Officer wasn't going to look kindly on a financially qualified licensee that would take his stations off the air and keep them off even though he had the financial wherewithal to operate them. So at the April 5, 1985 prehearing conference Williams represented that he would have WCSA back on the air by mid-April.[42] While he didn't meet that deadline he was able to restore service on May 22, 1985.

Issue 8 — Williams' Financial Qualifications

66. Under Issue 8 we must determine whether Jesse Williams is financially qualified to be or remain a Commission licensee. This inquiry encompasses Williams' ability to maintain and operate both WCSA and WJRL for three months without the benefit of revenues. The issue was added at Hill's request, and Williams never opposed its addition. See FCC 85M-860 released February 26, 1985.

67. *WCSA*. Except for a $10,000 mortgage on WCSA's land and building, Williams owns the land, building, technical equipment, furniture and fixtures outright. When he prepared to resume WCSA's operation in May 1985, Williams repaired and replaced the technical equipment, cleaned the grounds around the tower base, and built a new lockable fence around the tower. He paid about $10,000 for this refurbishing out of his own funds. WCSA's monthly operating costs are $4,375. He believes WCSA will reach a positive cash flow about 120 days after resuming operation.[43]

68. Williams has advanced and will continue to advance the funds needed to operate WCSA. WCSA was still operating as of the date of the Ripley hearing in September 1985, and Williams intends to continue its operations for the foreseeable future. Williams has about $10,000 to $20,000 in net liquid assets. These are cash assets deposited in the Bank of Faulkner. He has also obtained a $15,000 line of credit with the Bank of Faulkner. The sole purpose of this line of credit is to ensure that WCSA(AM) has sufficient funds to continue operating (Tr. 293-296).

69. *WJRL*. As previously noted (Findings paras. 11, and 62-63 *supra*.) Williams took WJRL off the air on December 5, 1982, and has no intention of putting it back on the air unless the

[42] Note that this representation was made within three weeks of Williams retaining communications counsel.

[43] WCSA billed about $2,500 in advertising in June 1985 (Tr. 238).

Commission orders him to do so. Consequently, Williams made no initial effort to prove himself financially qualified to maintain and operate WJRL for three months without the benefit of revenue. However, the Bureau — over Hill's vociferous objections — did so qualify Williams (Tr. 301-322).

70. *Assuming* that Williams wanted to go back on the air at WJRL, Williams owns the land, building, technical equipment, furniture, and fixtures outright. He conservatively values those assets at $75,000. He estimates that it would take no more than $18,000 to reactivate the station and operate it three months without reliance on revenues. Williams can advance that amount of funds for WJRL if he chose to resume operations. He could also obtain financing by way of a mortgage on the station's land and buildings, if need be. Finally, Williams says he could mortgage or sell his farmland to operate both the stations.

Issue 9 — The 47 CFR 73.3526 Public File Issue

71. This issue was also added on February 26, 1985, at Hill's request, and without any opposition from Williams. Hill contended that on January 30, 1985 he went to WCSA(AM) to inspect the public file, but was unable to because WCSA wasn't open for business.

72. Up until May 12, 1983, when Williams took WCSA off the air, he kept the public file at the receptionist's desk at the station. When he silenced the station the public file was complete. The public file continued to be located at the station after it went silent. During the period WCSA was silent, Williams did not keep the file up-to-date. Williams says he wasn't concerned about the public file during the silent period because WCSA was "a dead radio station," and the file was "a dead file" (Tr. 344, 358).

73. On February 18, 1985, Williams relocated the file to 117 North Main Street, Ripley. He published notice of the file's location in the *Southern Sentinel* on February 28, March 7, and March 14, 1985. After Station WCSA resumed operation on May 22, 1985, Williams updated the public file and moved it back to the station, where it is currently located.

74. *Intermediate Findings.* This issue will be resolved favorably to Williams. Any 47 CFR 73.3526 violation that Williams may have committed is *de minimis*, Kerry Hill wasn't injured by the violation, and the problem (subsumed in the larger question of WCSA's silence) has been cured.

Conclusions of Law

Introduction

1. This vintage renewal proceeding involves two small market stations owned by Jesse R. Williams (Williams). Under the name of Calhoun County Broadcasting Company, Williams seeks renewal of WJRL, Calhoun City, Mississippi (1980 population — 2,033). Under the name of Tippah Broadcasting Company, Williams seeks renewal of WCSA, Ripley, Mississippi (1980 population — 4,271).

2. Seven factual issues need to be resolved: (1) a 47 CFR 73.3526 public file issue; (2) a fraudulent billing issue; (3) a programming practice discrimination issue; (4) a financial issue; (5) an ascertainment misrepresentation issue; (6) a false publication/abuse of process issue; and (7) a failure to operate issue. The record shows that the first four of these issues will be resolved favorably to Williams, while the last three (5) — (7) will be resolved against him.

3. Because of the Commission's inexcusable administrative neglect, and because of the long-standing personal animosity between Williams and a rival licensee, Kerry Hill, this case can only be classified as an adjudicatory aberration. So before we make specific conclusions on each of the seven issues and before we arrive at the final disposition of this case, we must set out some general background conclusions. It is this backdrop which will permit a meaningful evaluation of events that occurred 16 to 20 years ago. Fortunately, some evidence on those old events had been preserved.

General Conclusions

4. Williams began operating WCSA, Ripley, back in 1964. Kerry Hill worked for Williams at WCSA as a salesman. After he left WCSA, in October 1972, Hill filed an FM rulemaking, and sought to have an FM frequency allocated to Ripley. The Commission granted his request, and on September 17, 1973, assigned Channel 272A to Ripley. See *FM Table of Assignments*, 42 FCC 2d 888. Hill, under the name of Country-Politan Broadcasting, Inc., immediately filed for that frequency.

5. It was at that point that Williams started the fight with Hill, a fight he could start, but as it turned out, he couldn't finish. Williams filed a "no-win" mutually-exclusive application on top of Hill on March 4, 1974. The reason it is described as a

"no-win" application is this: Since he already owned WCSA, Ripley, Williams knew he was a sure comparative loser against Hill unless he got some basic qualifying issues against Hill. But he never even tried to obtain such issues.[44]

6. Hill countered by seeking and obtaining character issues against Williams. See Findings 20, 28, and 32 *supra*. While this was going on Williams attempted to attack Hill's character by drawing up a phoney set of issues and publishing them in the local newspaper. In drawing up this false set of issues Williams did two things: First he deleted the basic qualifying issues that the Commission had designated against him. At the same time Williams manufactured basic qualifying character issues against Hill. Thus Williams made it appear that the FCC had accused his opponent of concealing financial information and of seeking a broadcast, license soley to enhance his (Hill's) political interests. It was these inexcusable gutter tactics that caused the then Broadcast Bureau to seek the false publication/abuse of process issue against Williams. See Finding 49 *supra*.

7. In the 1975 *Country-Politan* hearing between himself and Hill, Williams had the opportunity to address the character issues Hill and the Bureau had obtained. He refused to do so. Instead he dismissed his "no-win" FM application, and left the issues remain outstanding.[45]

8. Even though Williams had evaded a character inquiry in *Country-Politan*, the Commission could have and should have set his Ripley AM and his Calhoun City renewal applications for hearing. In this way they could have obtained evidence on those questions while the evidence was fresh and memories were good. Holding a character hearing certainly is never a pleasant regulatory duty, but there are times when they are unavoidable. Stated another way, the Commission owed it to Jesse Williams, the listening WCSA and WJRL public, and themselves to take evidence on the pending character issues and render the appropriate decision.

9. But now the Commission waffled. It shelved the issues and did nothing. For ten years (1975-1985) it left the character cloud hang over Williams' head. Of course, this ten year hiatus actually worked to Williams' benefit. In fact the only party that could

[44] It is the scenario that led the Presiding Officer to suspect that Williams might have been filing a "strike" or "delay" application against Hill. See Footnote 13 *supra*.

[45] At the juncture Williams either wasn't communicating with his counsel very well or he had no counsel at all. In any event this AM licensee deliberately elected to let a character cloud hang over his head.

gain from such a hiatus is Williams. He was on the air, and any evidence against him was growing stale. So the Commission was not only dodging its regulatory responsibilities, but by its inaction, it was creating the adjudicatory aberration that has resulted.

10. During the ten years Williams' character issues were on the shelf, certain other significant events occurred, events that must be considered in evaluating the outcome of the case.

11. First, and even though he had the financial wherewithal to continue operating WJRL, Calhoun City, Williams took the station off the air on December 5, 1982. And he did so " . . . due to the economical situation of Calhoun County, Mississippi."[46] He has never put the station back on the air although over three years have gone by; he has never seriously considered putting it back on the air; and he openly states that he will not do so unless he is ordered to by the Commission. This conduct and this attitude is antithetical to the public interest. But again the Commission must bear a share of the blame. To permit a licensee to go silent for such a flimsy reason, and to remain silent for over three years is a total abdication of regulatory responsibility. Stated another way Williams and the Commission have combined to deprive the listening public in the Calhoun City, Mississippi area of service for over the past three years.

12. Secondly, and during the 1975-1985 period, Williams took WCSA off the air. On May 12, 1983, he took WCSA off the air. He did so because he had an agreement with his arch rival, Kerry Hill, to sell the station to Kerry Hill. Predictably[47] the deal fell through on November 1, 1983. But even though he had the financial wherewithal Williams took no steps to put WCSA back on the air. It wasn't until after he finally secured competent communications counsel on April 1, 1985 that he finally owned up to his public interest obligations, and put WCSA back on the air. That took place on May 22, 1985, so WCSA was off the air from May 12, 1983 to May 22, 1985 on the basis of sales agreement that folded up on November 1, 1983. But again the Commission must bear its share of the blame. To permit WCSA to remain

[46] At the 1985 hearing Williams gave two other different reasons for taking WJRL off the air. The Presiding Officer chooses to credit the contemporaneous reason Williams gave at the time the station when silent.

[47] From the time the *Communications Act of 1934* was passed, it has always been the law that an alleged licensee wrongdoer has nothing to transfer unless and until he has cleared himself of the character allegations against him. So it is totally mystifying that Williams could possibly believe he could transfer *both* WCSA and WJRL with impunity.

silent for over two years is a total abdication of regulatory responsibility. Stated another way, Williams and the Commission have combined to deprive the listening public in the Ripley, Mississippi area of an AM service over a two year period.[48]

13. Finally, and during the 1975-1985 shelving period, Jesse Williams' health has deteriorated very badly. His health started going down hill in the latter part of 1980. He was operated on four times between January 4, 1982 and February 2, 1982 — twice for malignant cancer. His Doctor has declared Williams totally and permanently disabled. One half of his stomach, one kidney containing a malignant tumor and a malignancy in his right leg have all been removed. As of December 17, 1984, Williams was under his Doctor's care " . . . for clear cell carcinoma of the kidney metastatic to the bone." It is against this general background that the seven specific issues designated against Williams must be evaluated.

Issue 9 — The 47 CFR 73.3526 Public File Issue

14. It is true that Kerry Hill went to WCSA(AM) on January 30, 1985, and was unable to inspect the public file. But that's because WCSA was silent, and had been silent since May 12, 1983. No useful purpose would have been served by Hill's Janaury 30th inspection since WCSA was "a dead radio station" and the file was "a dead file." In any event less than three weeks later Williams updated and relocated the file to 117 North Main Street, Ripley. The file could be inspected there.

15. This isolated 73.3526 violation, if it can be called a violation was *de minimis*, Kerry Hill wasn't injured by the violation, and the 73.3526 problem has been cured. Issue 9 is resolved in Jesse Williams' favor.

Issue 2 — Williams' Alleged Fraudulent Billing

16. The charge that Jesse R. Williams tried to fraudulently bill WCSA's advertisers in early 1971 is utterly baseless. Jimmy Dale Hunsucker's testimony on the subject is both erroneous and warped. In 1971 Williams decided to increase WCSA's advertising

[48] At the time it issued its Hearing Designation Order on January 3, 1985, the Commission could have taken up the question of WJRL's and WCSA's silence. But the Designation Order was as silent as the stations were. Perhaps the Commission was so fixed on reallocating the burdens of proof on the 1975 issues that it overlooked the operational status of WCSA and WJRL.

rates. He told his station manager, Lewis Davis, to handle the rate increase in either of two ways. Either WCSA would reduce the number of spots per month and the advertiser would pay no more money, or the advertiser could keep the same number of spots and pay the higher rate. There is nothing fraudulent about that, and no evidence of fraud was introduced at either the 1975 or the 1985 hearings. Issue 2 is resolved in Jesse Williams' favor.

Issue 3 — Williams' Alleged Discriminatory Programming Practices

17. During the mid-1960s when Williams first went on the air, and when it was still fashionable in the Deep South to overtly discriminate against Blacks, he attempted to clothe WCSA, Ripley with a "white" image. Two incidents lead to this conclusion. In 1975 Williams told his station manager, Lewis Davis, that he didn't want any Negroes on his radio station (Finding 36 *supra.*), and he specifically instructed Lewis Davis to tell the County Farm Agent, Ray Sartor, that this included James F. Clarke, a Black Associate County Farm Agent.

18. There was a second incident about two years later. Lewis Davis instructed Reverend Jim Lindsey, a Baptist Minister, who was also working at WCSA as an announcer, that if a Black came to make a broadcast, or if a tape made by a Black was offered, that the volume of the station should be cut down to such an extent that it could only be heard a short distance.

19. But the record reflects these two isolated incidents were just that — isolated instances. There was no pattern of discriminatory programming practices. And by 1968, WCSA was presenting Blacks and Black-oriented programming, Black obituaries from the Black Funeral Home, Public Service Announcements for Black churches and civic groups, and Black Gospel music, both live and recorded. Moreover, between 1968 and 1975, James Clarke, the Black Associate County Farm Agent came to the station regularly and presented his USDA program. And Hazel Foster (a Black business-woman, an NAACP member, owner of Foster's Funeral Home, and long-time Ripley resident) stated that even during the mid-1960s she never had any problem getting her funeral announcements and her business advertisements broadcast, and she never observed any discriminatory programming practices at WCSA.

20. Based on the foregoing, we will resolve any doubts created by the two isolated incidents in Williams' favor. The weight of the evidence leads to the conclusion that Williams' programming

practices have not discriminated against the Black minority within Station WCSA's service area.

Issue 8 — Jesse Williams' Financial Qualifications

21. Under Issue 8 we must determine whether Jesse Williams is financially qualified to be or remain a Commission licensee. The record evidence shows that he is (Findings 66-67 *supra.*). Although he took WCSA off the air back on December 5, 1982, and it is still off the air, it was not for financial reasons. Williams has had the financial wherewithal all along to operate both stations if he chose to do so.

Issue 1 — Ascertainment Misrepresentation

22. Under this issue we must determine whether Williams misrepresented facts to the Commission about the conduct of his WCSA community ascertainment survey. The record shows Williams' 1974 ascertainment that he purportedly made, and submitted to the Commission under his signature was full of misrepresentations. At least nine people that Williams swore he had interviewed stated that neither Williams nor anyone else at WCSA had ever surveyed or even contacted them.

23. Some of Williams' representations were not only false they were ludicrous. For example, Williams claimed he had interviewed William Lassiter, a Ripley Shoe Products Company employee. Lassiter pointed out that he hadn't been an employee of that Company for two years before the survey allegedly took place. Another alleged interviewee had been committed to a state mental institution some five months prior to the purported ascertainment interview.

24. Williams doesn't deny the falsity of the information he sent the Commission under his signature. Instead he argues that he delegated certain interviews to his station manager, Lewis Davis; that Davis turned over the survey information to him that eventually proved to be false; and that he (Williams) shouldn't be held accountable for Davis' falsifications.

25. That argument is rejected. A principal is responsible for the acts of his agent performed within the scope of his employment. Williams, an experienced broadcaster, had been on the air since 1964. Lewis Davis had been his station manager from the beginning. Williams knew of the importance the Commission placed on ascertainment survey information. He assigned part of this important work to his number one man — his station manager, Lewis Davis. He must certainly take the responsibility

for that type of an agent. The fact that Davis turned false information to Williams, who in turn submitted it as his own to the Commission doesn't make the information any less false.

26. It is concluded that Williams, back in 1975, submitted false ascertainment information to the Commission, and under ordinary circumstances,[49] it would be fitting to further conclude that Williams is not of fit character to be a Commission licensee.

Issues 4-5: The False Publication/ Abuse of Process Issues

27. The record reflects that in preparation for the 1975 *Country-Politan* hearing, Williams deliberately authored and had published a bogus set of hearing issues. In an effort to strike back at his rival Kerry Hill who he perceived was trying to defame him, Williams not only falsely attacked Hill's character,[50] he used and abused the Commission's process to carry out that false attack (see Findings 18, 49-59, and Conclusion 6 *supra.*). Not only that, but when he authored the bogus issues, Williams deleted the basic qualifying issues the Commission had designated against him.

28. Williams says he's sorry and that back in 1975 he apologized to everyone — including Hill. The short answer is that his apology is not enough. Such gutter tactics are inexcusable. He says he erred because he acted without the assistance of counsel. It doesn't take a lawyer's assistance to know when you're acting with malevolence.

29. The Bureau observes that Williams is "... sincerely repentant for his past actions." That isn't what the Presiding Officer observed, and it isn't consistent with the record facts. The record shows that in 1985, ten years later, Williams was still using and abusing the Commission's processes. He was filing unauthorized letters and telegrams; he was still evading responding to legally-filed pleadings; and he was improperly trying to put Congressional pressure on the Presiding Officer. In fact it wasn't until after he had obtained communications counsel on April 1,

[49] That these are not ordinary circumstances has already been discussed (Findings 5-18 and Conclusions 1-13 *supra.*), and will be discussed further *infra.*

[50] This is not to suggest that the Presiding Officer believes Hill to be a paragon of virtue. He may well be the soundrel both Williams and the Mass Media Bureau claims he is. But Hill's character isn't in issue here. What's more, and despite what the Bureau says about Hill in their Proposed Findings of Fact, it's dollars to doughnuts that Hill's fitness to operate WTXI(FM), Ripley, Mississippi, who never be called into question.

1985, that Williams began to get his act in order (see Findings 58-59 *supra.*).

30. It must be concluded that Jesse R. Williams authored and caused to be published a phoney set of hearing issues, and that he has abused the Commission's processes both in 1975 and again in 1985. Under ordinary circumstances (See Footnote 49 *supra.*), it would certainly be fitting to further conclude that Jesse R. Williams is not of fit character to be a Commission licensee.

Issue 7 — Williams' Silencing of WCSA and WJRL

31. The record reflects that Jesse Williams ceased operating both WCSA and WJRL, and failed to amend the WCSA and WJRL applications to reflect the substantial changes in their operational status (Findings 9-11, 60-65, and Conclusions 11-12 *supra.*). Moreover, the reasons Williams gave for taking those stations off the air, and keeping them off the air for an extended period of time are flimsy at best.

32. On December 5, 1982, Williams took WJRL off the air " . . . due to the economical situation of Calhoun County, Mississippi." He has never put it back on the air. Even though he is financially qualified to do so, Williams has never seriously considered putting WJRL back on the air and openly states that he will not do so unless and until the Commission orders him to do so.

33. On May 12, 1983, Williams took WCSA off the air. He did so because he had reached an agreement with Kerry Hill to sell Hill the station.[51] However, after the agreement fell through on November 1, 1983, and even though he was financially qualified to do so, Williams took no steps to put the station back on the air. It wasn't until after he retained communications counsel on April 1, 1985, that he indicated a willingness to return to the air. On May 22, 1985, WCSA renewed broadcast service to Ripley, Mississippi.

Issues 6 and 10 — Ultimate Conclusions

34. Against the unique procedural background, and the evidence that has been adduced, we must decide how to dispose of this case. We must decide whether to renew Williams' WCSA, Ripley application, his WJRL, Calhoun City application, both of those applications, or neither of them.

[51] But see Footnotes 40 and 47 *supra.*

35. *WCSA, Ripley.* First, let it be said that there are considerations flowing in both directions. On the one hand, Williams has made misrepresentations to the Commission; i.e., he has submitted false ascertainment data. He authored and had published a bogus set of hearing issues for the *Country-Politan* hearing; in so doing, he concocted character issues against his opponent, deleted basic qualifying issues that had been designated against himself, and gave the public the impression that the Commission was concerned about topics that it wasn't concerned about at all. In brief, and in preparing for the *Country-Politan* hearing in 1975, he grossly abused the Commission's processes. He continued to abuse the Commission's processes during the initial stages of the 1985 hearing until April 1, 1985, when he finally retained communications counsel. Finally he took WCSA off the air on May 12, 1982, and although he was financially qualified to operate the station, he unjustifiably kept it off the air from November 1, 1983 until May 22, 1985.

36. On the other hand, the Commission should never have shelved the 1975 issues. Williams had the right to an expeditious hearing on the character issues Hill and the Bureau had obtained. The Renewal Staff's failure to give him that hearing is tantamount to misfeasance. To sit on such issues for ten years is totally indefensible. This misfeasance becomes even more acute when one realizes that during the ten year hiatus Williams' health has so deteriorated that he cannot mount the vigorous defense he probably could have previously.

37. Moreover, the fact that WCSA was silent for over two years is just as much the Commission Staff's fault as it is Williams. The Staff could have ordered him back on the air at any time. Williams was financially able to restore broadcast service to the Ripley area. All it took was a telegram from the Staff. The Commission's abject lack of concern for the listening public in the Ripley area must be considered in balancing the equities in this case.

38. Moreover, it should be noted that Williams voluntarily returned WCSA to the air. At the April 5, 1985 prehearing conference, Williams' counsel announced that Williams would have WCSA back in operation by mid-April. While Williams didn't meet that deadline WCSA was back on the air on May 22, 1985. And this record shows that it is operating today. So, unlike WJRL *infra.*, Williams has demonstrated some concern for the WCSA listening public. That is more concern than the Commission has shown.

39. When the factors favoring a grant of WCSA's renewal are weighed against those favoring a denial, the need for administrative atonement wins out. This whole sorry mess has as its root source the Commission's failure to set Hill's 1975 character allegations for hearing. The stale evidence, the vintage affidavits, the need to reassign the evidentiary burdens, Williams' ill-health, even WCSA's two years of silence, these are all products of ten years of Commission waffling. The Commission can make amends to Williams by granting his WCSA renewal. So be it.

40. One more factor must be considered about WCSA's renewal. It's true that under ordinary circumstances the conclusion would have been inescapable that Williams doesn't possess the necessary qualifications to be a Commission licensee (see Conclusions 22-26, 27-30, and 31-33). And the application of administrative atonement can't change that fact. However, Williams has represented that if he is granted renewal at WCSA, Ripley, he will sell the facility and get out of the broadcasting business. We can only hope that he'll live up to his promise. There is no need in the broadcast business for licensees of Williams' ilk.

41. *WJRL, Calhoun City*. Having ruled that atonement considerations warrant granting WCSA's renewal, Williams is fresh out of equities. He now stands before us as: one who has misrepresented facts to the Commission; one who has authored and published false hearing issues; one who has continously abused the Commission's processes; and one who took WJRL, Calhoun City off the air for the flimsiest of reasons, and has kept it off the air for over three years although he was financially able to operate it. Moreover, during that three year period Williams never considered putting WJRL back on the air, and will not do so unless he is ordered to by the Commission.

42. Under these circumstances the Presiding Officer could not, in good conscience, grant the WJRL renewal. Expiation for Commission misfeasance is one thing, rewarding a wrongdoer is another. Wiliams has not only shown that he is dishonest and unreliable, he hasn't even shown an interest in the Calhoun City listening public. It would be excessive to grant the WJRL renewal.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, the renewal application of Tippah Broadcasting Company for WCSA, Ripley, Mississippi (BR-4402, BR-790202YE, BR-820201XV) IS GRANTED; and

The renewal application of Calhoun County Broadcasting Company for WJRL, Calhoun City, Mississippi (BR-4829, BR-790202YE, BR-820201WM) IS DENIED.[52]

FEDERAL COMMUNICATIONS COMMISSION

WALTER C. MILLER, *Administrative Law Judge*

[52] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

Customer Premises Equipment
Rulemaking, Notice of Proposed
Telephone Companies

Notice of Proposed Rulemaking adopted concerning enhanced services, customer premises equipment (CPE) offerings, nonregulated services, and transactions between telephone companies and their affiliates.
—*Cost Allocations*
CC Docket No. 86-111

FCC 86-146

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Separation of costs of regulated telephone service from costs of nonregulated activities.	CC Docket No. 86-111
Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies, to provide for nonregulated activities and to provide for transactions between telephone companies and their affiliates.	

NOTICE OF PROPOSED RULEMAKING

Adopted: April 3, 1986; Released: April 17, 1986

BY THE COMMISSION:

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I. INTRODUCTION

1. By this Notice we seek comment on methods of separating the costs of regulated telephone service form the costs of the nonregulated activities of telephone companies and their affiliates. The ultimate goal of this proceeding is to ensure that ratepayers in the interstate jurisdiction pay telephone rates which are just and reasonable, as mandated by Section 201 (b) of the Communications Act of 1934, as amended.[1] In order to assure just and reasonable rates for services that remain subject to regulation, it is necessary to guard against cross-subsidy of nonregulated ventures by regulated services. In telephone companies which engage in nonregulated activities, or which are affiliated with entities enagaged in nonregulated activities, cross-subsidy may result either from improper allocation of common costs[2] or from improper intracorporate transfer pricing of services and assets provided by one affiliate to another. Accounting rules in themselves, of course, can change neither the ability nor the incentive of a carrier to engage in such cost shifting. However, accounting separation between regulated and nonregulated activities can make it possible for regulators to detect cost shifting if it occurs. To be adequate to this purpose a system of accounting separation must do three things: (1) establish rules and standards for cost allocations; (2) establish rules for transactions between the regulated company and its corporate affiliates; and (3) establish the accounting procedures, reporting requirements, and other mechanisms needed for implementation and monitoring of the cost allocation and transfer pricing rules. Part II, below, addresses cost allocation and transfer pricing rules. Part II, below, addresses cost allocation issues, seeking comment on alternative basic approaches to cost allocations as well as on a number of

[1] 47 U.S.C. Sec. 201(b)

[2] When a company uses the same plant or productive operation to produce several products, those costs which cannot be specifically identified with a single product are referred to by economists as either "joint costs" or "common costs." If product A and product B are produced only in fixed proportions, their costs are "joint." If A and B may be produced in variable proportions, so that production of A uses capacity that could be used to produce B, then their costs are "common". *See.* A. E. Kahn, Economics of Regulation, Vol. 1, pp 77-79 (1970). Under these definitions, it would appear that few of the costs which must be allocated among the products and services of telephone companies would properly be termed "joint". Therefore, we shall, in this Notice, generally refer to those costs which cannot be directly assigned either to regulated operations or to nonregulated activities as "common costs".

specific problems and issues. Part III proposes rules for transactions with affiliates. Part IV addresses necessary changes in our current rules for accounting for nonregulated activities.

2. This proceeding has its origins in the *Second Computer Inquiry* (Computer II)[3] and, more immediately, in the Computer II *Implementation Proceeding*, in CC Docket No. 81-893 (Fifth Report and Order).[4] The proposals we make herein, however, deal not only with the enhanced services and customer premises equipment (CPE) offerings which were the focus of Computer II, but also with the entire range of nonregulated services which might be offered by a telephone company and the whole range of transactions that might result between a telephone company and its nonregulated affiliates. The proceeding is closely related to the current *Third Computer Inquiry* (Computer III)[5] although the changes we propose in Parts III and IV, below, are not dependent upon the outcome of Computer III or the proceeding to reexamine separate subsidiary requirements for the provision of CPE by Bell Operating Companies,[6] and, indeed, would be necessary even in the absence of those proceedings. It is, of course, our intention to resolve the broad cost allocation issues raised in Computer III[7] and the cost allocation matters addressed in Part II of this NPRM in a coordinated, consistent fashion.

3. This proceeding is also related to our current effort in Docket 78-196 to revise the Uniform System of Accounts (USOA) and Financial Reporting Requirements for Class A and Class B Telephone Companies.[8] In that proceeding we are proposing to

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[3] Amendment of Section 64.702 of the Commission's Rules and regulations (Second Computer Inquiry), 77 FCC 2d 384 *recon*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), aff'd sub nom. Computer & Communications Industry Ass'n v. FCC, 693 F. 2d 198 (D.C. Cir. 1982), *cert. denied* 461 U.S. 938 (1983).

[4] Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services, Fifth Report and Order, FCC 84-547, 49 Fed. Reg. 46378 (Nov. 16, 1984). We refer generally to the proceeding in CC Docket No. 81-893 as the "Implementation Proceeding."

[5] Notice of Proposed Rulemaking in CC Docket No. 85-229 (Third Computer Inquiry), FCC 85-397 (released August 16, 1985), 50 Fed. Reg. 33581 (Aug. 20, 1985).

[6] In the Matter of Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, FCC 86-113 (released March 28, 1986).

[7] Third Computer Inquiry at para. 69 and nn. 53, 54. Comments submitted in the Third Computer Inquiry and addressed to matters raised in this NPRM will be included in the record of this proceeding.

[8] *See* Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies (Parts 31, 33, 42, and 43 of the FCC's Rules), CC Docket No. 78-196, Further Notice of Proposed Rulemaking, 100 FCC 2d 480 (1985). Comments have been received on this

rescind Parts 31 and 33 of our Rules and replace them with Part 32, a new USOA for all telephone companies subject to our jurisdiction. In the *Further Notice of Proposal Rulemaking*, which sets forth our final proposal for Part 32, we stated that we would address identification of nonregulated costs in a separate proceeding.[9] This is that proceeding; any changes in Part 31 which we may adopt here will later be adapted to and incorporated into the Part 32 scheme.[10]

II. COST ALLOCATIONS

4. In developing the cost allocations proposal set out below, we have been guided by a long history which includes the jurisdictional separations process, the allocation of AT&T's interstate costs among its regulated services, and the *Computer II* approach to the allocation of costs between regulated and nonregulated activities. We have also had the benefit of reports from the General Accounting Office and the Telecommunications Industry Advisory Group. In Section A, below, we review our experience with cost allocations. In Section B we set out for comment two basic approaches to regulatory oversight of allocation of costs between regulated and nonregulated activities. In Section C we highlight and seek comment upon a number of cost allocation problems and issues.

A. BACKGROUND

1. Jurisdictional Separations

5. Part 67 of our Rules, the Separations Manual, sets out standard procedures for separating telephone company property investment, revenues, expenses, taxes, and reserves between the state and interstate jurisdictions. The first official separations manual was adopted by NARUC in 1947. The current Part 67 reflects numerous subsequent revisions. Pursuant to Section 410 (c) of the Communications Act, the continuing process of revising the Separations Manual is accomplished with the assistance of Federal - State Joint Boards.[11]

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proposal, and the Commission action is pending.

[9] *Id.* at para. 75.

[10] We are basing the instant proposal on Part 31 accounting only because the rules and standards we are planning to adopt here will be needed well before Part 32 can be fully implemented.

[11] *See* Reservation Telephone Cooperative, 59 R. R. 2d 484, 486-488 (1955) (discussion of development of Separtations process); Separations Procedures, 26 FCC 2d 247, 259-264 (1970) (dissenting opinion of Commissioner Johnson).

6. According to Sec. 67.1(1) of this Commission's Rules, the fundamental basis upon which separations are made is the use of telephone plant in each operation. Application of this apparently simple concept is rendered complex, however, by the realities of an integrated telephone system in which network architecture is not dictated by political boundaries and in which most plant is used in common for both intrastate and interstate operations. Separation on the basis of plant usage requires both the identification of any plant which is used for operations in only one jurisdiction and the allocation, through application of relative use and other factors, of any plant used in common for operations in both jurisdictions.

7. Separations begins with costs as they are recorded in a company's books of account as prescribed by Part 31, the USOA. The USOA, however, generally records the cost of an item of plant according to the physical aspects of the item, and may not reflect its use. For example, cable plant is recorded in subaccounts according to whether it is aerial, buried, underground, or submarine cable, and not according to whether it is used to construct a subscriber loop, an interoffice trunk, or an interexchange trunk.[12] The first step in the separations process is the reclassification of the costs recorded under Part 31 accounting classifications into literally hundreds of Part 67 categories and subcategories. The Manual provides, in varying degrees of specificity, instructions for the assignment of costs in each account to the designated categories. For some accounts, application of Separations Manual procedures leads to the individual assignment of virtually every item on the company's continuing property record to its proper separations category.

8. The second step in separations is the apportionment of costs within the categories between the state and interstate operations. Although the categories and subcategories are designed so as to group together those costs which can be directly assigned to one jurisdiction, many categories must still be allocated between the jurisdictions by factors such as weighted standard work seconds, holding time minutes, or conversation minute miles. The Manual provides an allocation rule or principle for every category that is not directly assigned.

9. As complex as the Separations Manual is, it is still only a bare outline of the actual separations process as that process is currently conducted. Much of the direction contained in the

[12] We have, however, proposed to change these cable accounts and many other anachronistic categories in our USOA Revision proceeding, *supra*, note 8.

Manual is general, and this Commission is from time to time called upon to issue interpretations. Companies employ large numbers of people who spend all of their time on the separations process. Joint Boards are required frequently to adjust the Manual to changes in the industry and in regulatory policy.

10. Furthermore, despite its multiplicity of detailed cost categories and allocation factors, the Separations Manual does not represent an especially sophisticated or accurate cost allocations system. We do not contend that it assigns "true" economic costs to the jurisdiction;[13] it incorporates unavoidable inaccuracies and intentional policy choices, and individual judgments.[14] Nevertheless, since it is an existing, long-established system, it is at least a reference point for the development of other allocation systems. Furthermore, since jurisdictional separation is an essential aspect of state and federal economic regulation, any additional allocation procedures should be compatible with the current separations process.

2. Allocation of interstate costs among AT&T's regulated services

11. In the 1981 *ICAM Order* this Commission promulgated an interim cost allocation manual for use in allocating AT&T's interstate costs among its interstate services.[15] The process which led to ICAM taught us valuable lessons about the relationship between theory and practice in the area of cost allocations.

12. *Fully Distributed Costing v. Long Run Incremental Costing.* During the era when telecommunications was provided largely by regulated monopolies, we seldom interfered with the manner in which carriers chose to allocate their total revenue requirements among their service. In the mid-1960s, however, serious concern about the allocation of costs among regulated services began to arise. In 1965, during the course of the *Domestic Telegraph Investigation*, Docket 14650, AT&T produced the "7-Way Cost Study",[16] which distributed investments and

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[13] *See* AT&T, Manual and Procedure for Allocation of Costs, 84 FCC 2d 384 (ICAM Order), *modified*, 86 FCC 2d 667 (1981), aff'd sub nom. MCI Telecommunications Corp. v. FCC, 675 F. 2d 408 (D.C. Cir. 1982) We there expressed doubt that any existing cost allocation technique is sufficiently refined so as to enable assignment of "true economic costs" to modern telecommunications services. *Id.* at 392, nn. 26, 27.

[14] *See* Reservation Telephone Cooperative, *supra* note 46, para. 11 (analogizing Part 67 to a treaty between state and federal regulators.)

[15] Note 13, *supra.*

[16] *See* Report of the Telephone and Telegraph Committee in the Domestic Telegraph Investigation, Docket NO. 14650, at 200.

expenses to AT&T's existing interstate services. That study showed large disparities betweeen the rates of return earned by AT&T's services. These results, which raised the possibility that services most vulnerable to competition were subsidized by other services, helped prompt the general investigation into the lawfulness of all of AT&T's rates and services which was begun in Docket No. 16258.[17]

13. One result of the proceedings in Docket 16258 was development by the Common Carrier Bureau of a *Statement of Ratemaking Principles and Factors.* This Statement recognized two approaches to utilizing costs as a basis for determining rates: fully distributed costing (FDC) and long run incremental costing (LRIC). Each approach involved a different view of what constitutes cross-subsidy. AT&T advocated the LRIC approach coupled with a "burden test" by which it attempted to determine if customers of services such as MTS were better or worse off when other services were offered, by comparing the added revenues of the other service with its added costs. The Bureau staff favored an FDC approach coupled with an "equality of return" test for cross-subsidy. This approach required that overall costs be equitably distributed to all services, and assumed cross-subsidization occurred whenever some services earned substantially less than the average overall rate of return.

14. A review of theoretical and specific costing proposals took place in Docket 18128, a proceeding which ultimately involved the lawfulness of all of AT&T's private line service tariffs.[18] In that proceeding, the Commission considered how theories of marginal costing and pricing might be applied to firms engaged in both "monopoly" and "competitive" enterprises.[19] It also examined AT&T's version of LRIC and observed that it appeared to be merely a special form of full cost pricing in which incremental costing was applied only to private line services, leaving monopoly services to bear almost all overhead costs. Since the Commission could find, in the environment of 1976, no basis for according this kind of special treatment to Bell's competitive services, it

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[17] For a more extensive account of the history of these matters, *see* AT&T Long Lines Department, Revisions of Tariff FCC No. 260 Private Line Services, Series 5000 (TELPAK), Docket No 18128, 61 FCC 2d 587, 591-598 (1976) (Docket 18128 Decision), *recon.* 64 FCC 2d 971 (1977), *further recon.* 67 FCC 2d 1441 (1978), aff'd sub nom. Aeronautical Radio, Inc, v. FCC, 642 F. 2d 1221 (D.C. Cir. 1980).

[18] Docket 18128 Decision, Note 17, *supra.*

[19] In the mid-1970s this Commission assumed that private-line services would be subject to competition and services such as MTS and WATS would not be subject to competitioon.

ruled that recovery of full recorded costs was in the public interest, and that proportionate distribution of such costs best furthered the purposes of the Act.[20]

15. *FDC methodologies.* Seven FDC methodologies were presented for consideration in Docket 18128.[21] The recommended decision had favored Method 1, an approach corresponding to Separations Manual principles which is based on recorded historical costs. This Commission, however, found Method 7, a method based on historical cost causation, more attractive for ratemaking and tracking purposes. We held that a modified Method 1 approach, was the most desirable approach to distributing full costs.

16. AT&T developed several FDC manuals for use in its tariff filings, but these procedures did not produce lawful rates. Worse, the procedures were so unwieldy and complex, and the data they produced so massive and incomprehensible, that this Commission was unable to prescribe lawful rates to replace the rates we found unlawful. It also appeared that the extreme fungibility of telecommunications plant might be an insurmountable barrier to implementation of a practical cost allocation system based on historical cost causation. In September 1979 this Commission launched the *ICAM* proceeding with a Notice of Inquiry[22] seeking information which would allow us to propose new cost allocation rules for AT&T. We adopted the Interim Cost Allocation Manual (ICAM) in January 1981.[23]

17. *ICAM* The interim cost allocation manual originally required AT&T to allocate costs among four broad service categories (MTS, WATS, Private Line and ENFIA) using methodologies that are analogous to Separations Manual procedures. ICAM makes no attempt to further allocate costs among services within the categories, though AT&T must still provide cost support for each tariffed service. ICAM continues in use today; possible replacements are being considered.

18. *Departures from FDC.* Even as we were working in Docket 18128 to implement our decision to require FDC for regulated services, we recognized that there would be situations in which departures from FDC would serve the public interest.[24] One practice which we did not wholly preclude, for example, was the

[20] Docket 18128 Decision, 61 FCC 2d at 638.
[21] *Id.* at 642.
[22] Notice of Inquiry in Docket No. 79-245, 73 FCC 2d 629 (1979).
[23] Note 13, *supra.*
[24] Docket 18128 Decision, 61 FCC 2d at 661, 663.

offering of volume discounts to private line customers. Initially, we felt constrained to place stringent limits on such discounts. We required that such discount be cost justified, that the discount rates exactly reflect the carrier's cost savings in providing bulk service, and that the rates be targeted to recover costs on an FDC basis. The only exception to these requirements was to be by waiver, granted upon showing of competitive necessity or other policy justification. We established a rigorous evidentiary standard for such waivers, requiring the carrier to demonstrate that, absent the discount, customers would in fact shift to alternative sources of service.[25]

19. Soon, however, we began to seek better methods of assuring just, reasonable, nondiscriminatory private line rates while affording dominant carriers the flexibility needed in an increasingly competitive environment. In our *Private Line Guidelines Order*[26] we adopted procedures for tariff review which would decrease our reliance on detailed cost analysis as the principal means of assessing the reasonableness of private line rates. At the same time we changed our policy with respect to volume discounts. We saw that courts had rejected FDC as a standard for determining if prices are "predatory" for an antitrust purposes. We noted a substantial body of judicial and scholarly opinion holding that maintenance of an FDC price floor above marginal cost encourages underutilization of resources and impairs competition on the basis of relative efficiency. We examined the argument that a discount below an FDC price always involves a cross-subsidy in that users not receiving the discount pick up the "shortfall" through greater-than-FDC rates. We found that argument seriously flawed in that it overlooked the possibility that without a discount, a large user might turn to an alternative source and thereby cease making any contributions at all to common costs. Thus, we concluded it was possible that in some cases volume discounts between FDC and marginal cost might promote reasonable rates for all users.[27] Finally, we recognized that, in light of growing competition, the public interest would be served by adoption of a less rigorous standard of proof for showing that rates below FDC are needed to meet competition.[28]

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[25] *See* Private Line Rate Structure and Volume Discount Practices, Notice of Inquiry and Proposed Rulemaking, 74 FCC 2d 226, 250–251 (1979).
[26] Private Line Rate Structure and Volume Discount 97 FCC 2d 923 (1984).
[27] *Id.* at 947.
[28] *Id.* at 948.

20. Although we decided that requiring all private line and special access volume discounts to be justified by FDC studies might not promote the goals of the Communications Act, we did not adopt an alternative costing standard. Rather, we decided that we would consider each volume discount individually until we developed sufficient experience to establish pricing guidelines.

21. We also began an inquiry into the need for guidelines for MTS rates and rate structures. In our *MTS Rate Guidelines Order*[29] we not only departed from FDC, but also specified an alternative standard for determining the reasonableness of message telecommunications service (MTS) optional calling plans (OCPs). We again found that FDC was not useful for deciding if prices are too low, that insistence on FDC can undercut efficiency, and that adherence to FDC standards is not always necessary to prevent cross-subsidization. On the other hand, we also recognized that marginal cost standards, however attractive in theory, are difficult to use for regulatory purposes because marginal costs are not readily measured by conventional accounting methods. We therefore adopted, as a useful proxy for marginal costs, a "net revenue standard" under which the carrier would have to demonstrate that a proposed MTS discount or package would increase net MTS revenues.[30] We also established a number of other guidelines and requirements for OCPs, striking thereby an overall balance between carriers' needs for pricing flexibility and the need to protect competition and consumers from predatory or anticompetitive pricing.

3. Allocation of common costs between Computer II subsidiaries and their affiliates.

22. A prominent feature of structural separation as a regulatory tool is that it allows the regulator to avoid cost allocation problems by simply prohibiting companies and their separate affiliates from incurring common costs.[31] The Computer II structural separation conditions did indeed preclude joint activity in those areas which the Commission deemed particularly susceptible to siginificant cost misallocation. Moreover, for the provision of enhanced services, and enterprise which necessarily involves use of transmission facilities in common by the subsidiary and its operating company affiliate, the Commission prescribed a firm

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[29] Guidelines For Dominant Carriers'; MTS Rates and Rate Structure Plans, CC Docket NO. 84-1235, FCC 85-540 (released October 17, 1985).

[30] *Id.* at paras. 40-56.

[31] Second Computer Inquiry, 77 FCC 2d at 461-462.

rule for cost allocation: the subsidiary must acquire the use of transmission facilities at the tariff price.[32]

23. In other areas, however, such as the provision of administrative services, the Computer II decisions permitted operating companies and their affiliates to perform services for their separate subsidiaries. The Commission required that such transactions be compensatory.[33] In addition, it employed two mechanisms for regulatory oversight of the manner in which costs of shared activities were allocated. First, the Commission adopted a rule requiring that transactions between the subsidiary and its affiliate be reduced to writing and filed with the Commission.[34] This rule applied to all transfers of anything of value, whether made directly or by accounting entries, except for transactions governed by tariff. Second, the Commission required AT&T to submit an accounting and cost allocation plan for its shared administrative services.[35] Similar accounting plan requirements were subsequently applied to the BOC's shared services, dial-tone referral, and joint billing activities.[36] Accounting and cost allocation plans have also been required as conditions upon various waivers and, most recently, in conjunction with our action relieving AT&T of structural separation for its CPE activities.[37]

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[32] 47 C.F.R. Sec. 64.702 (c)(1).

[33] In the Computer II Reconsideration Order, 84 FCC 2d at 79, we stated:

> We have not required third-party transactions in every area where the compensatory nature of parent-subsidiary transaction might be at issue. We also will not attempt to anticipate all the forms that such intracorporate transactions might take, so the specificity of the term "compensatory" is necessarily limited. Still, this does not mean that we cannot offer some clarification. Our use of "compensatory" in this proceeding means that for each transaction, the parent corporation or affiliated entity must recover from its subsidiary the full cost of the transferred goods or services at the same terms, prices, and conditions that would be available to a nonaffiliated purchaser if third-party transactions were required. Since the parent would expect to earn reasonable profits on third-party transactions, it will be expected to earn similar profits on intracorporate transfers. Since it would expect to recover transaction costs and overhead loadings in its third-party transactions, it will be expected to make similar recoveries in its intracorporate transfers.

[34] 47 C.F.R Sec 64.702 (c)(5).

[35] 77 FCC 2d at 477; 88 FCC 2d at 548.

[36] Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services, and Cellular Communications Services by the Bell Operating Companies (BOC Separation Order), 95 FCC 2d 1117, *recon.* FCC 84-252 (released June 1, 1984), *aff'd sub nom.* Illinois Bell Telephone Company v. FCC, 740 F. 2d 465 (7th Cir. 1984), *decision on recon. aff'd* North American Telecommunications Ass'n v. FCC, 772 F. 2d 1282 (7th Cir. 1985).

[37] Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Co., FCC 85-509, 50 Fed. Reg. 40379 (Oct. 3, 1985) (AT&T Relief Order). Cost allocation issues have also been addressed in

24. *Shared administrative services plans.* According to the Computer II decisions, AT&T was to have in place a satisfactory accounting and cost allocation plan before it began to share administrative services with its subsidiary. AT&T filed its proposed shared services plan in January 1982, along with an outside auditor's report on the plan. After Bureau information requests and two rounds of public comment, this Commission addressed the portion of the plan which dealt with sharing of corporate headquarters serviced in the June 1982 *General Departments order.*[38] We ruled on the remainder of AT&T's proposal in December 1982 in the *Shared Services Order.*[39]

25. Although the Common Carrier Bureau granted conditional approval of AT&T's shared services accounting plan in July 1982, this Commission deferred reaching final conclusions on the plan until after it had been put into operation. To facilitate monitoring of AT&T's implementation of the plan, we required AT&T to submit further outside audit reports and to file regular information reports on shared service.[40] We also directed our staff to investigate and report upon the adequacy of AT&T's accounting and cost allocations. This process included extensive information requests, examination of documents in AT&T's Washington offices, and on-site reviews at Bell Labs and the General Departments. We adopted the staff's Report on Shared Administrative Services as part of its January 1984 *License Contract Order.*[41] At each stage of these proceedings, this Commission found that, while the shared services plan was in most respects adequate, changes were required to assure against inappropriate cost shifting. AT&T's shared services plan underwent significant changes in December 1984[42] and again in April 1985,[43] as a result

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orders reviewing capitalization plans for, and preoperational expenses of, Computer II subisdiaries. *See generally*, American Telephone & Telephone Co, 90 FCC 2d 404, *recon* 91 FCC 2d 578 (1982) (Enhanced Services Capitalization Order); American Telephone & Telegraph Co., Third Report Regarding Staff Audit of Preoperational Expenses Associated with the Formation and Development of Products for ATTIS, FCC 84-484 (released October 25, 1984).

[38] American Telephone & Telegraph Co., Report on Services to be shared between Fully Separated Subsidiary and Affiliated Companies and Associated Costing Methodology, 90 FCC 2d 184 (1982) (General Departments Order).

[39] American Telephone & Telegraph Co., Report on Services to be shared between Fully Separated Subsidiary and Affiliated Companies and Associated Costing Methodology, 92 FCC 2d 676 (1982) (Shared Services Order).

[40] General Departments Order at para. 66.

[41] License Contract Agreements and Other Intra System Arrangements of the Major Telephone Systems, FCC 83-601 (released January 16, 1984).

[42] *See* Letter from Chief, Common Carrier Bureau, to D. J. Culkin, AT&T (dated December 31, 1984).

[43] AT&T Information Systems, Inc., Petition for Waivers in Connection with

of reorganizations within AT&T.

26. In the *BOC Separation Order*, we allowed the BOCs, on an interim basis, to share with their separate subsidiaries the same administrative services we had permitted AT&T to share, provided the subsidiaries were charge with all of the costs of providing those services.[44] Most BOCs filed shared administrative services plans on February 28, 1984. In February 1985, in the *BOC Capitalization Plan Order*,[45] we required the BOCs to update their shared services plans so that our staff could complete its analysis of their sharing proposals.[46] Staff review of the BOCs' updated plans is still in process.

27. The *BOC Separation Order* also modified the Computer II prohibition on joint marketing to allow BOCs to refer their business and residence customers to their subsidiaries for CPE. Companies wishing to engage in this practice, commonly referred to as "dial tone referral", were to obtain approval of accounting and cost allocation plan which would allocate to their subsidiaries all the direct and indirect costs of dial tone referral. All BOCs except the US West companies filed dial tone referral accounting plans. In the *BOC Capitalization Plan Order* this Commission discussed a number of problems which companies were experiencing in identifying the costs of dial tone referral, but did not approve any of the plans. In addition, we required the companies to conduct semi-annual representative samples, conforming to the support standards of Sec. 1.363 of the Rules, of the time spent on dial tone referral, as well as to review and evaluate whether they had identified all of the dial tone referral costs which should be charged to their subsidiaries. During 1985, the Accounting and Audits Division of the Common Carrier Bureau audited the dial tone referral accounting plans of several BOCs.

28. *AT&T's Installation and Maintenance Plan.* In the *Computer II Further Reconsideration*,[47] this Commission granted a temporary waiver allowing AT&T operating companies to install and maintain business CPE for AT&T's CPE subsidiary for a period of eighteen months, provided that the costs of such services were charged to the subsidiary on a fully distributed

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AT&T Line of Business Reorganization, Mimeo No. 3925 (released April 18, 1985).

[44] BOC Separation Order, 95 FCC 2d 1117, 1149.

[45] Capitalization Plans for the Furnishing of Customer Premises Equipment and Enhanced Services, 58 RR 2d 471 (1985).

[46] *Id.* at 490.

[47] 88 FCC 2d 512 (1981).

basis,[48] In January, 1982, AT&T filed its installation and maintenance accounting plan.[49] Review and approval of this plan took more than a year; the process included a round of public comment, several detailed letters from the Common Carrier Bureau identifying problems and requiring changes,[50] development by AT&T and the Bureau of an audit program for oversight of the plan,[51] and field investigations by Bureau staff of the manner in which operating company personnel put the plan into effect.

29. *BOC Accounting Plans filed pursuant to Computer II Waivers.* The March 1985 *Asynchronous-X.25 Waiver Order*[52] permitted BOCs to provide protocol conversion, an enhanced service, using equipment which is not only collocated with their central offices, but which may in some cases be the same equipment they use to provide basic, local packet switching. Before they can take advantage of this waiver they must, *inter alia*, file accounting plans demonstrating how they will allocate an appropriate portion of the investment in common equipment to the nonregulated protocal conversion activity.[53] For companies seeking to market protocal conversion jointly with packet switching, the accounting plan must also provide for the allocation of joint marketing costs.[54] Although perfection of the collocation waivers and grant of further joint marketing waivers was envisioned in the March order as an expedited process, the first accounting plan which was filed raised cost allocation issues that required six months, two Bureau orders, and the filing of a new accounting plan to resolve.[55] Several other plans remain under review.

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[48] *Id.* at 532.

[49] AT&T, Report to the Common Carrier Bureau on Installation and Maintenance of Business Customer Premises Equipment to be Performed for the fully Separate Subsidiary (filed January 14, 1982).

[50] *See* Letter of the Chief, Common Carrier Bureau, to Alfred A. Green, AT&T, (dated July 26, 1982); Letter of the Chief, Common Carrier Bureau, to D. J. Culkin, AT&T, (dated August 30, 1982); Letter of the Chief, Common Carrier Bureau, to Alfred A. Green, AT&T (dated December 16, 1982).

[51] *See* Letter from D. J. Culkin, AT&T, to the Chief, Common Carrier Bureau, (filed December 28, 1982); Letter from the Chief, Common Carrier Bureau, to D. J. Culkin, AT&T (dated February 18, 1983).

[52] Petitions for Waiver of Section 64.702 of the Commission's Rules (Computer II), 100 FCC 2d 1057 (1985).

[53] *Id.* at 1102.

[54] *Id.* at 1104.

[55] *See* New Jersey Bell Telephone Company, Mimeo No. 0426 (released October 24, 1985); New Jersey Bell Telephone Company, Mimeo No. 1426 (released December 13, 1985); *applications for review pending.*

30. We also required accounting plans for companies wishing to provide Network Channel Terminating Equipment (NCTE) under waiver on an unseparated basis.[56] Three companies filed such plans.

31. *AT&T's CPE Accounting Plan.* In February 1985, when we proposed to allow AT&T to provide CPE free of structural separation, we requested that AT&T submit with its comments a description of the accounting techniques it would use in the absence of structural separation to separate regulated form nonregulated costs. The accounting plan which AT&T submitted conformed with the accounting rules prescribed in the *Implementation Proceeding* and employed cost allocation techniques similar to those used in previously approved AT&T accounting plans. We determined, however, that we would need more information about the accounting plan in order to assure ourselves that AT&T would not subsidize its CPE business with revenues from regulated services. Accordingly, in the *AT&T Relief Order*, we ordered AT&T to submit a new, more detailed accounting plan before beginning to provide CPE on an unseparated basis. AT&T made the required submission on October 8, 1985. Following procedures established in the *AT&T Relief Order*, the Common Carrier Bureau conducted an initial review of the plan and, on November 27, 1985, approved implementation of the plan on an interim basis.[57] At the same time, public comment was solicited on the plan and a more detailed review was begun.[58] True-ups will be required should this review process reveal deficiencies which resulted in improper cost shifting. As an additional safeguard against undetected cross-subsidization, we required AT&T at its own expense to submit the operation of its accounting plan annually to an independent audit.

4. Cost Allocations Under Parts 34 and 35

32. The current accounting rules for nonregulated activities were originally developed for use by the record industry in

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[56] American Information Technologies, Inc. BellSouth Corporation, Southwestern Bell Corporation, Petitions for Waiver of Section 64.702 of the Commissions's Rules and Regulations to Enable Certain Bell Operating Companies to Offer Digital NCTE Without Structural Separation, Mimeo No. 6893, para. 20 (released Sept. 11, 1985).

[57] In the Matter of Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Co., Mimeo No. 1143 (released Nov. 27, 1984), application for review pending.

[58] *Id.* at para. 2.

accounting for provision of detariffed CPE.[59] When we adopted those accounting rules for the record carriers, we also added to the Uniform Systems of Accounts for Radiotelegraph Operators (part 34) and Wire Telegraph and Ocean Cable Carriers (Part 35) the following provision regarding cost allocations:

> All subject carriers must submit detailed allocation procedures by account to be used to separate those costs incurred by the carrier that are common to both the carrier's operations and its affiliates' operations or common to both the carrier's regulated and nonregulated operations. These procedures and any revisions must be filed with the Commission 90 days prior to their implementations. Unless notified within 90 days by the Commission of its objections, the procedures will become the basis for the allocation of common costs between regulated and nonregulated activity. (See secs. 35.1625 and 35.1749.)[60] Pursuant to this rule, cost allocation manuals were submitted by Western Union, ITT World Communications, TRT Communications, RCA Global Communications, Western Union International, and FTC Communications. Although the manuals varied greatly in completeness and level of detail,[61] initial staff review did not reveal problems so egregious as to warrant delaying implementation of the procedures set out therein.

5. General Accounting Office Report

33. In a report dated September 2, 1983, the General Accounting Office (GAO) assessed the status of this Commission's activities regarding allocation of costs between telephone companies' regulated and nonregulated activities.[62] Noting that the then pending NPRM in the *Implementation Proceeding* had not put forth a specific cost allocation proposal, the GAO offered two suggestions which it believed would enhance this Commission's efforts. First, the Commission could adopt the cost accounting standards promulgated by the former Cost Accounting Standards Board (CASB) for use in allocating costs to national defense contracts.[63] GAO expressed the view that CASB standards are

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[59] *See* Part IV. A., below.

[60] 47 C.F.R. Sec. 35.03-17 (d). Identical language appears at 47 C.F.R. Sec. 34.03-17(d).

[61] For example, one company filed a three-page statement explaining why it could not fully comply with the Commission's requirement due to the limitations of its acounting software. Another company submitted a manual which indicated that many special studies would be performed to determine allocation factors, but which gave no information at all about those studies.

[62] U.S. General Accounting Office, "Status of Federal Communications Commission Efforts to Allocate Costs Between Telephone Companies' Regulated and NonRegulated Activities". (September 2, 1983) (GAO Report).

[63] The Cost Accounting Standards Board (CASB) was an agency established by Congress within the General Accounting Office to promulgate uniform cost accounting standards for national defense contractors. Between 1970 and 1980, the CASB adopted 19 Cost Accounting Standards (CASs), which are codified at

applicable in any situation in which expenses must be traced to final cost objectives based on a causal or beneficial relationships.[64] Second, the Commission could consider use of independent auditing firms to evaluate carriers' cost accounting procedures. GAO saw this approach as particularly advisable in the event that we would not be able to obtain increased funds for our own audit activities, since otherwise this Commission would be reduced to reliance on carrier self-certification of compliance, oversight by state regulators, and the self-interested vigilance of competitors.

6. Telecommunicatons Industry Advisory Group Report

34. The Telecommunications Industry Advisory group (TIAG) was established to develop, prepare, and submit a proposal for a revised Uniform System of Accounts. To date, TIAG has submitted seven reports to this Commission, the last of which was entitled "Determination of Nonregulated Costs in Regulated Entities."[65] This report addressed both accounting mechanisms and allocation principles for removing from the ratemaking process the costs of those nonregulated activities which do not use telecommunications network plant in common with regulated services.[66] TIAG's cost allocation recommendation was built on general principles drawn from CASB standards.[67] TIAG proposed that each company be required to file and maintain current an implementation plan describing its cost allocation procedures. Each company would file with its plan the results of a review by an independent certified public accountant, in which an opinion was expressed as to whether the company's cost accounting procedures were in compliance with this Commission's rules. Like

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4 C.F.R. Parts 400–420.

[64] The GAO Report particularly recommended the following CASs as relevant to Computer II cost allocation issues: 403 (Allocations of home office expenses to segments); 404 (Capitalization of Tangible Assets); 409 (Depreciation of Tangible Assets); 410 (Allocation of business unit general and adminstrative expenses to final cost objectives); 418 (Allocation of direct and indirect costs); 420 (Accounting for independent research and development costs and bid and proposal costs). GAO Report at Appendix IV p. 29.

[65] TIAG Definitions and Rules Subcommittee, "Determination of Nonregulated Costs in Regulated Entities" (dated September 7, 1984) (TIAG Report).

[66] TIAG assumed that all activites involving common investment or expenses could be characterized either as Provision of Facilities (construction, maintenance, removal, and support of plant dedicated to nonregulated use) or as Shared Administrative Services. TIAG Report at 3. In other words, there would be no common operating plant except support plant. *Id.* at 21.

[67] TIAG noted, however, that a number of the CASs, for example those dealing with depreciation and benefits, deal with matters which are already subject to specific provisions of the USOA. *Id.* at 14.

GAO, TIAG also recommended annual independent audits of companies' cost allocations.

B. Proposals: Basic Approaches

35. As foregoing discussion demonstrates, we have until now taken an ad hoc, case-by-case approach to the regulatory oversight of allocation of common costs between regulated and nonregulated activities. In the case of companies subject to structural separation, we have reviewed separate accounting plans for each situation in which we have permitted a company to incur common costs. For all other companies, we have relied almost exclusively upon audit review as a means of monitoring cost allocations. In other words, we have, in the main, reacted to the carriers' proposed allocation procedures. In so doing, we have created a small body of negative precedent concerning particular practices which we have found unacceptable, inadequate, or otherwise problematic. The only substantive standard guiding our staff and the carriers through this process has been the basic requirement that nonregulated activities bear their fully distributed costs.

36. This case-by-case, reactive approach was appropriate, perhaps even necessary, given our initial lack of experience with accounting for nonregulated activities. It was, however, a time consuming, expensive, and uncertain process, both for us and for the carriers. It worked reasonably well when we were dealing only with AT&T, but it did not work so well with seven regional holding companies. It is clear that a different scheme for regulatory monitoring of cost allocations will be needed as more companies enter into more, and more diverse, nonregulated activities.

37. The essential elements of such a scheme are suggested by the GAO and TIAG reports: (1) cost allocation standards and guidelines, to be adopted by this Commission; (2) written cost allocation manuals, to be developed by the carriers in accordance with our standards and guidelines; and (3) an oversight and enforcement mechanism which supplements our own audit capability with independent review of both the cost allocation manuals and of the manner in which companies implement the procedures set out in those manuals. The content of the standards and guidelines, the nature of the manuals, and the scope of the outside auditor's task all depend, however, upon our choice of cost allocation methodologies.

38. Our review of the history of our involvement with cost allocations and our experience with the jurisdictional separations process give rise to two competing conclusions regarding the methodology we should adopt for separating regulated from nonregulated costs. On the one hand, it appears that while we have investigated a number of methods of fully distributing telecommunications investment and expenses to final cost objectives, the only method we have ever been able actually to implement has been the method embodied in the Separations Manual and ICAM: allocation of recorded historical costs based largely on actual measurements of relative use of plant. This point of view suggests that the most workable system for separating regulated from nonregulated costs would be one that is patterned on the jurisdictional separations process. A separations-style approach is, accordingly, set out for comment below as Alternative #1.

39. On the other hand, the jurisdictional separations approach is far from ideal, even in its current application to the task of allocating costs among operations which are all regulated and which use common plant in essentially similar ways. It may be that separations-types procedures can not properly capture the costs of nonregulated services, particularly those nonregulated services which use common plant differently from the way that same plant is used in providing regulated service. More fundamentally, it may be that relative use assignments would hinder, rather than enhance, our ability to detect the shifting of nonregulated costs to regulated operations. This may be so because relative proportional assignments lead to cost allocations to a service which are dependent on the performance of all other services subject to the same assignment. Assigning costs to nonregulated services on this constantly changing relative use basis could preclude tracking cost and revenue relationships unique to any service. In other words, if the demand for any related service changes, the common costs would automatically shift among other services, and we would have no way of determining whether the shift was justified. This point of view suggests that we should abandon the separations approach and seek a new system which allows the most appropriate cost allocation methodology to be chosen for each nonregulated product or service, based upon the unique characteristics of that nonregulated activity. Such an approach is set out for comment below as Alternative #2.

1. Alternative #1: Separations-type approach

Cost Allocation Standards

40. We agree with GAO that a set of general cost allocation rules would be useful to an accounting separation scheme. As TIAG has pointed out, however, we cannot satisfy our need for such standards by simply incorporating into our rules the Cost Accounting Standards (CAS) created by the CASB. Some of the CAS cover areas already governed by the USOA, while others are largely irrelevant to our purposes because they address problems peculiar to the competitive bidding process. Parts of the CAS, particularly Standards 403 (Allocation of Home Office Expenses to Segments) and 418 (Allocation of Direct and Indirect Costs) appear, on the other hand, to be highly relevant to our task. We have, accordingly, drawn heavily upon those standards, and upon TIAG's discussion of the applicability of CAS principles to telephone company cost accounting, in formulating the following proposed standards for a cost allocations approach based on Separations Manual concepts:

I. Costs shall be directly assigned to either regulated or nonregulated activities whenever possible.

II. Only those costs which cannot be directly assigned to regulated or nonregulated activities shall be treated as common costs. Common costs shall be grouped into logical, homogeneous, statewide[68] cost pools and fully distributed between regulated and nonregulated activities in accordance with the following hierarchy of allocation techniques:

A. Whenever possible, the allocation of common costs is to be based upon direct objective measurements of actual relative use.

B. When direct measurement is impractical, the relative use of an input or suppport function is to be measured indirectly by employing a surrogate measure having an observable or logical correlation with that input or support function.

C. When direct measurements of relative use are impractical and indirect measures are precluded through the lack of acceptable surrogates, a general composite allocator is to be employed. This allocator is to consist of three equally weighted factors: assets, expenses, and wages.

41. *Direct assignments.* Under these standards, companies would seek to minimize the amount of costs subject to allocation

[68] We propose statewide, rather than company-wide, allocation pools because this is the level at which USOA accounting and reporting, depreciation rate prescription, jurisdictional separations, and access charge calculations are carried out.

by making as many direct assignments as possible. Any item of equipment which is used only for regulated service would be directly assigned to regulated service, and any item which is only used for nonregulated activities would likewise be directly assigned to nonregulated activities. Assume, for example, that a company provides a nonregulated information storage and retrieval service. The company has 100 central offices in a state. Information storage and retrieval facilities are located in 16 of those offices. Six offices are equipped with new switches that are designed so that the computer processing capacity of the switch can be used to provide the nonregulated information service. In the other ten offices, separate devices are installed to provide the information service. In this example, the investment in add-on information service devices would be assigned directly to nonregulated activities. The investment in 94 central office switches that are not used to provide information storage and retrieval would be assigned directly to regulated service. The six new switches, if they are in fact used to provide the nonregulated service, would be treated as common plant; investment in those switches would form a single cost pool to be allocated, preferably, in accordance with the relative use of those switches for regulated and nonregulated service.[69]

42. *Direct measurement of relative use.* Under Alternative #1, direct measurement of relative use is the preferred allocation technique because such measurements are objective and verifiable. Using this technique, building usage might be measured in terms of actual square footage of dedicated space; equipment usage in terms of actual machine hours; and support services in terms of actual labor hours. Such data would, of course, be used in combination with corresponding square footage costs, equipment costs, or labor rates.

43. The Separations Manual establishes the units of measure in which usage of telecommunications plant has traditionally been measured. These units may or may not be appropriate for measuring relative use as between regulated and nonregulated services. Consider again the example described in paragraph 41, above, of a central office switch that is also used to provide

[69] This example is used here only to illustrate the concepts of direct assignment and common cost pools. The assignment and allocation of equipment investment costs is, of course, not the only cost allocation issue raised by this hypothetical service configuration. See, *e.g.*, paras. 43 and 64, below.

information storage and retrieval. Conventional measures of switch usage, such as holding time minutes, would probably not be useful for measuring the use of the processing capacity of the switch by the nonregulated information service; some new unit of measure would have to be found. We invite comment on the extent to which new ways of measuring plant usage would need to be developed if we were to adopt cost allocation procedures which favor allocations by actual relative use.

44. *Surrogate measures.* A surrogate measure of the relative use of an input or support function, could be the relative use of the function that receives the input or support. For example, the proportion of total fuel costs attributable to a regulated activity might be indicated by the proportion of total engine hours devoted to the same activity. Stated more generally, an expense that supports operating plant might be allocated most accurately by employing the same relative-use ratio determined for the operating plant itself. Similarly, the proportion of personnel assigned to an activity might be an appropriate surrogate for the proportion of managerial costs attributable to that activity.

45. Alternatively, the best surrogate for a supporting function's relative use might not be the relative use of the supported functions but, rather, the relative use of the supporting function's *output.* When the output is essentially homogeneous, its relative use by regulated and nonregulated activities can be expressed as units of end product produced by the supporting function. For example, the relative number of printed pages might be an acceptable surrogate for the relative use of a print shop; and the proportion of purchase orders processed might by a satisfactory surrogate for the relative use of a purchasing department.

46. *General Allocator.* Some expenses cannot be easily related to services based on measures of use. Examples include general and administrative expenses arising from executive, accounting, treasury, and other general office operations, and expenses incurred maintaining assets such as the company's name. We propose that companies allocate these costs using a general allocator reflecting relative size. Indicators of size include total expenses, assets, wages, number of employees, and revenues. A general allocator is typically constructed by first calculating ratios for several of these measures, and then calculating an average of those ratios.

47. We propose a three factor allocator using total expenses, wages, and assets, as the factors. We do not include revenues because revenues measure only the ability of an activity to bear

costs, and not the amount of resources used by the activity. We see use of revenues as a factor in allocating telephone company common costs as promoting subsidization by established regulated operations of new nonregulated activities, which may require much input of resources before producing any revenues at all.

48. In calculating the three factor allocator, we propose to use gross book value as the measure of assets. This ensures that the measure of assets is not distorted by accelerated depreciation of nonregulated assets. We are proposing total payroll wages rather than an employee headcount as one of the factors of our general allocator because wage data is directly obtainable from accounting records and need not be adjusted to account for part time employees, new hires, or terminations.

49. In order not to complicate the allocation process, we propose that current month expenses be allocated using factors developed from the prior month's data. Thus, data to construct the three factor allocator will be available prior to the close of the current period books. We invite comment on the calculation and use of our three factor allocator, on any alternative allocators which might better achieve our purposes,[70] and our proposed use of prior month's data.

Cost Allocation Manuals

50. The cost allocation standards we adopt will be incorporated into Part 31 of our Rules, and will apply to all companies subject to Part 31. We propose, in addition, to require those companies subject to Part 31 which are either Tier 1 local exchange carriers[71] or dominant interexchange carriers, and which engage in nonregulated activities, to file with this Commission cost allocation manuals setting out in detail their procedures for separating regulated from nonregulated costs. The filing of the manuals will provide a mechanism whereby we can conduct an initial review of the manner in which companies propose to apply the standards described above. The manuals will also provide a written, measurable baseline against which auditors can measure compliance and consistent application of cost accounting practices.

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[70] For example, in our analysis of Comsat's sharing of costs between regulated and nonregulated operations, we required the use of a cash expense formula to allocate general investment and expenses. *See* Comsat Restructure Order, 97 FCC 168 (1984).

[71] Tier Companies consist of those local exchange that earn more than $100 million in total company regulated annual revenues, Public Notice, Monitoring Plan, Mimeo No. 2133 (released January 25, 1985) at para. 7.

51. Under Alternative #1, we would propose that cost allocation manuals be organized according to Part 31 accounting classifications. For each account and subaccount, a manual would describe the criteria for identifying directly assignable costs, the allocation pools to which common costs recorded in that account or subaccount will be assigned, and the basis on which the costs in each pool will be allocated. The manuals would also include general descriptions of each nonregulated business in which the company is engaged, descriptions of nonfinancial data maintained to implement cost allocations, and descriptions of the methods used by the company to charge direct material and labor. We envision such a manual as being more detailed and more informative than ICAM, but less complex than the Separations Manual. A draft model cost allocation manual of this type appears in Appendix 1. We seek comment on the format and content of this draft manual. We strongly urge companies to "try on" our proposed cost allocation standards and our draft manual by drafting and submitting cost manuals of their own as addenda to their comments. This will help us to identify and correct any misconceptions and oversights, and also to better understand the similarities and differences in the ways in which companies intermingle their regulated and nonregulated businesses. It may also enable us to expand and elaborate our manual and may permit most companies to use a model manual with minor adjustments.

52. Most telephone companies are already engaged in some nonregulated activities. We would not require the submission of satisfactory cost manuals as a precondition upon continuation of existing nonregulated activities or upon entry into new, nonregulated enterprises. Nor will we require companies to delay implementation of the procedures set out in their costing manuals pending our review and approval, as we did with the record carriers. Instead, we would require companies to implement their cost manuals as soon as the manuals are filed. The Common Carrier Bureau would conduct an initial review of each manual and would inform companies as soon as possible of deficiencies. Further review, which would include an opportunity for public comment, would be undertaken after the filing of the initial independent audit reports, in order that we might focus our investigative efforts on problem areas or companies. We would propose, however, that before implementation of any future decision to lift separate subsidiary requirements for provision of

CPE or enhanced services generically, we would require filing of an acceptable cost allocation manual.[72] Under this proposal, waiver requests to offer a specific kind of CPE or a specific enhanced service on an unseparated basis would still be treated on a case-by-case basis.

Oversight

53. *Monitoring.* The real test of our cost allocation rules and of the procedures established by the carriers in their manuals will be the reasonableness of the allocations which result from applying those rules and procedures. In today's increasingly competitive market for telecommunications products and services, it is important to detect and correct as soon as possible any practices which produce significant misallocations of common costs. Towards this end, we intend to monitor closely both the results of cost allocations and the growth of nonregulated services which receive allocations of common costs. We seek comment on what financial and operational data we will need to carry out this monitoring process, and on the frequency with which such data should be reported to us.

54. *Independent Audits* We propose to augment our routine audit processes, which include review of cost allocations, by requiring each company to submit each year the report of an independent auditor attesting that the company has designed and implemented its cost allocation manual in a manner consistent

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[72] In our recent NPRM concerning the BOC petitions for waiver of the structural separation requirements for the provision of CPE, we stated that:

> because we have decided to initiate a proceeding to examine joint and common costs allocation questions for all common carriers subject to our jurisdiction, we conclude that the accounting issues raised by the BOCs provision of CPE in the absence of structural separation should be deferred to that proceeding. We anticipate that any relief for the BOCs from the structural separation requirements that may result from this proceeding would be predicated on their compliance with the accounting conditions established in the Joint Cost proceeding. We expect that the two proceedings will be concluded at approximately the same time; and even if an Order in this docket were to precede an Order in the Joint Cost proceeding by a few months, permitting the BOCs to file interim plans based on accounting principles different from those adopted in that proceeding would not be cost-effective.

Notice of Proposed of Rulemaking, Furnishing of Customer Premises Equipment, CC Docket No. 86-79, RM-5230, FCC 86-113 at para. 41, (released March 28, 1986.) We continue to hold this view.

with regulatory requirements.

55. Telephone companies are already required to account separately for nonregulated activities, to allocate costs to nonregulated activities on a fully distributed basis, and to maintain records to support their allocations.[73] Currently, our chief means of enforcing these broad requirements is through audit review. However, at a time when all government agencies are preparing for budget reductions, it would be unrealistic to rely exclusively on Commission audits as the only mechanism for enforcing important policies. For this reason we propose independent audits as adjuncts to, but not as replacements for, an intensified Commission audit program. We would require companies to submit to us both the audit report and the management letter prepared by the independent auditor. In addition, we would require that the independent auditors make available to the Commission, upon request, their work papers and all other documentation supporting their findings.

56. The independent audits we propose to require will differ from the traditional financial statement audit. We will expect the auditing firms to examine both the cost allocation manual and the manner in which the manual is implemented, and to express an opinion on whether the carrier is in compliance with our cost allocation and accounting rules. This type of audit is generally known as an "attest" audit. Standards for such audits are currently under consideration by the American Institute of Certified Public Accountants.[74]

57. As was noted in the 1983 GAO report, one potential drawback to reliance on independent audits is the perception that auditor hired by a company may not be wholly objective. We seek comment on whether we could improve the reliability and usefulness of independent audits through a "designated auditor" program in which we would state which firms could be used for the audits we would require. We do not anticipate using such a program to favor a few selected firms; rather, we would wish to grant such status freely, subject to revocation in the event that a firm's audits prove biased or unreliable.

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[73] Implementation Proceeding at para. 12.

[74] American Institute of Certified Public Accountants, Auditing Standards Board, "Proposed Authoritative Statement Attestation Standards" (exposure draft, February 15, 1985).

2. Alternative #2: Service Costing Approach

58. *Cost allocation standards.* As stated previously, we believe there may be serious drawbacks fo using an allocation scheme patterned on the jurisdictional separations process to allocate costs to the various and disparate nonregulated products and services which telephone companies may provide. We therefore propose, as an alternative, the approach described by the following cost allocation standards:

I. Costs shall be directly assigned to either regulated or nonregulated activities whenever possible.

II. Only those costs which cannot be directly assigned to either regulated or nonregulated activities shall be treated as common costs. Common costs shall be identified separately for each nonregulated product, service, or activity. Each nonregulated service shall be assigned common costs in accordance with the following techniques:

A. Telecommunications network plant costs and related expenses shall be allocated to a nonregulated service based on the projected utilization of plant by that service.

B. Other costs should, to the extent possible, be allocated according to direct or surrogate measures of actual use.

C. Only when no other allocation technique is available should a general or composite allocator be employed. This allocator shall consist of three equally weighted factors: assets, expenses, and wages.

59. *Projected utilization.* Allocation based on projected utilization differs from allocation based on relative use in that, when projected utilization is employed, the amounts of common plant costs and related expenses allocated to one service do not depend upon the performance of the other services which share those costs. This approach would require the carrier to make a service-specific cost study for each nonregulated service that utilized network plant, and to develop a forecast of the demand for each such nonregulated service. The cost study would identify all of the costs–direct and indirect, fixed and variable–of providing the service in question.[75] It would use these costs to

[75] This allocation technique may be incompatible with our current accounting rules, under which common plant remains in operating accounts but related common expenses are transferred each month to nonoperating accounts. Proposed rule changes which would allow all common costs of nonregulated network services to be removed from amounts subject to separations, but retained in operating accounts for financial reporting purposes, are discussed in detail in Part IV of this NPRM.

determine the unit costs[76] of the service at various levels of demand. The amounts to be allocated to that service would be calculated by multiplying the pertinent unit costs by the forecasted demand quantities.

60. *Cost Allocation Manuals* Under Alternative #2, companies would be required to file cost allocation manuals with this Commission. The manuals would be organized on service-by-service basis rather than on an account-by-account basis. For each nonregulated service, the manual would list, by Part 31 account and subaccount, each type of cost which must be assigned or allocated to that service. For each type of cost listed the manual would describe in detail a procedure for determining how much of that cost would be incurred to produce a "unit" of the nonregulated service. We anticipate that most of these procedures will be able to be stated as general rules applicable to all services, or to groups of services, but that some services may require unique costing procedures. We invite comment on new usage and nonusage based methods which might need to be developed to measure costs of utilizing telecommmunications plant for nonregulated services.

61. *Oversight* We would propose, as under Alternative #1, both staff monitoring and independent audits. Under Alternative #2, however, Commission staff would focus on comparing actual use to forecasted use in order to validate the allocation factors used to assign common costs to each of the various nonregulated activities. We invite comment on new reporting requirements which might be necessary to implement this type of monitoring effort.

C. Specific Issues and Problems

1. Fully Distributed Costing

62. We propose to retain our long standing requirement that nonregulated activities bear their fully distributed costs. We recognize, however, that there may be some nonregulated services which companies should be permitted to offer on a less than fully distributed cost basis. As explained more fully in Part IV, below,

[76] The development of the unit cost for a nonregulated service owuld be the same as if the service were used in a regulated offering. The cost flowing into the separations process for the regulated use of the facilities or expenses would be at the same unit cost level as for the nonregulated. In reality, the Part 67, Part 69, or state commission rules for cost assignment which pertain to the regulated service may result in a different cost assignment due to the use of more broadly based allocations.

we intend to consider alternative cost accounting proposals for certain types of nonregulated activities on a case-by-case basis.

2. Time reporting

63. In our experience, telephone companies use to different methods of time reporting. One form of time reporting is usually referred to as "exception time reporting," or ETR. Under this system, an employee is permanently assigned to an accounting code which represents the activity in which he is normally engaged. All of his time, and hence all of the costs of his labor, is automatically attributed by means of this code to his usual activity unless, at the end of the pay period, he submits a time report stating that he worked a certain number of hours on some other activity. If he works only on his usual activity, he submits no time report. Some ETR systems permit the employee's normal accounting code to be changed with his work assignments, so that he is never required to report the majority of his time as "exception time."

64. Under the other type of time reporting, positive time reporting, all or nearly all of an employee's time is positively reported to codes representing activities, entities, services, or items of equipment. This system is used, for example, by installation and maintenance personnel who report their hours according to the specific items of equipment on which they worked.

65. Paticipants in past proceedings have often attacked time reporting as unreliable, inaccurate, and unauditable. We also have questioned certain time reporting practices, and have required changes.[77] We recognize that individual employees may report their time inaccurately due to forgetfulness, disinclination to fill out forms, or a desire to conform their reported time to the expectations of their supervisors. We also realize that it is possible for a company to manipulate an ETR system by, for example, assigning all employees to regulated activities regardless of the amounts of time they actually spend on nonregulated activities. Nevertheless, we tentatively conclude that we should permit both ETR and positive time reporting because we believe

[77] *See* General Departments Order (note 38, *supra*) at para. 55 (directing AT&T to file exception time reports for every hour or more of work done for ATTIS, rather than for every halfday's work); License Contract Order, Staff Report on Shared Administrative Services at paras. 60–64, 72. (requiring AT&T to review ETRs to assure that ATTIS was billed for all work performed for it by AT&T personnel).

that these methods produce more reasonable attributions of many types of labor costs than would be produced by using derived allocation factors. We request comment on guidelines, safeguards, or procedures which would enhance the accuracy of time reporting. We also request that telephone companies responding to this notice describe their time reporting systems to us. We are particularly interested in answers to the following questions: What incentives are there for employees to report time accurately? What types of employees use positive time reporting and what types use ETR? What portion of the dollars currently attributed to nonregulated activities are: (1) directly assigned by means of time reporting; (2) allocated on the basis of dollars directly assigned through time reporting; (3) first assigned to a common cost pool by time reporting and then allocated on some other basis?

3. New investment in common plant

66. One set of cost allocation issues raised by the trend towards integrated systems networks revolves around the extent to which investment once allocated to nonregulated activities should be allowed to enter the rate base for regulated services. These concerns appear to be particularly acute in the case of new investment in common plant. Consider the example of a new switch which, in the year it is installed, is allocated 90% to regulated telephone service and 10% to nonregulated activities. If nonregulated use increases, we would, of course, expect to see an increased portion of costs allocated to nonregulated activities. But if nonregulated use should decrease, or cease entirely, should we likewise freely allow the allocation of costs to regulated service to be increased? We believe that, in general, a company should be barred from absorbing useless nonregulated investment into its rate base, and from thus shifting part of the risk of some flexibility in this area, however. It may be, in a situation such as is illustrated by our example, that even if the company had never planned to use it for nonregulated activities. Or, the regulated service may have a present or foreseeable need for the capacity formerly devoted to nonregulated activities. One possible approach would be to adopt a rule prohibiting reallocation of nonregulated investment to regulated operations, but to allow waivers in special circumstances. Another approach would be to incorporate into our monitoring and auditing programs a system whereby substantial shifts in allocation of common investment would automatically trigger an inquiry in which the company

would be asked to justify the reallocation it had made. A third possibility would be to simply rely on the ability of regulators to disallow costs in rate cases aa the main safeguard against this form of cost shifting. Under any of these approaches, how should we treat the costs of modernizing the network, if modernization is of benefit to both regulated and nonregulated operations? How should investment which represents facilities available for future growth be allocated? We invite comment on these matters.

4. Treatment of combined marketing costs

67. The treatment of the common costs involved in combined marketing of regulated and nonregulated services and products is a perennial source of controversy. In *Computer II* we specifically pointed to marketing as an area fraught with the possibility of undetected cost shifting due to the difficulty of determining whether common costs have been properly allocated. Parties to various proceedings have contended that marketing costs for nonregulated services often constitute very high percentages of the total costs for nonregulated services often constitute very high percentages of the total costs of those services, that marketing costs are impossible to allocate, and that we should deal with these purportedly insoluble problems by either prohibiting all combined marketing or by allocating all of the common costs of marketing to nonregulated activities.

68. Much of the perception that all marketing costs are impossible to allocate appears to have formed around the image of an account executive who spends a great deal of time getting to know a large customer, becoming familiar with the customer's business and its telecommunications needs, and who then, after many hours of effort, sells an integrated telecommunications system composed of basic services, enhanced services, and CPE. It is probably true that neither the executive, his supervisor, nor an auditor can determine precisely how much time he should report to each product and service that he sold. We suspect, however, that these types of cost in fact make up a relatively small portion of the total of all marketing costs, and that even sales persons such as the hypothetical account executive in our example can accurately report much of their time. Moreover, we also believe that there are many other marketing costs which are amenable to direct assignment or to allocation based on objectively verifiable direct or surrogate measures of use. Examples of such costs might include product-specific advertising, sales com-

missions, engineering and design support, bid preparation, and product-related training.

69. Based on the assumption that many marketing costs can be directly assigned, we propose the following treatment of marketing costs: "Marketing" costs for purposes of cost allocations between regulated and unregulated activities, shall be the costs recorded in accounts 640–650, excluding 644. All marketing costs which can be directly assigned should be so assigned. Those costs which can be allocated based on direct or surrogate measures should be so allocated. The residual of "unallocable" marketing costs should then be divided between regulated and nonregulated activities based on the ratio of costs already attributed to those categories.

70. We solicit comment on the validity of the assumptions underlying this proposal and on alternative means of allocating marketing costs. We also invite parties to submit analyses based on actual marketing cost data demonstrating how the results of our approach might differ from the results of the following alternatives: (1) allocating the residual cost by the General Allocator; (2) allocating the residual cost by the ratio of directly assignable costs alone.

5. Treatment of overheads.

71. Part 31 allows carriers to record certain types of expenses in clearing accounts. These accounts are then cleared, that is distributed, to other cost objectives. Other types of expenses are also treated as loadings within carrier accounting systems. We do not propose to change these procedures. To the extent that carrier accounting systems currently distribute common plant expenses as loadings, these expenses would not have to be separately identified and allocated. Rather, the loadings would be treated as part of the expense pool to which they were assigned, and they would be allocated between regulated and nonregulated services in the same manner as other expenses in the pool. We invite comment on our tentative conclusion that carriers' existing treatment of overhead loadings does not give rise to material misallocations of costs.

6. Allocation of Depreciation Reserves

72. If depreciation reserves are allocated between regulated and nonregulated services based upon the allocation of the corresponding plant accounts, and if the capability of newer plant to provide nonregulated service is much greater than that of older plant,

misallocations of depreciation reserve can result. Consider the following example: Office A was installed 10 years ago for $100. In consists of older technology equipment that provides very little nonregulated service. A study shows that 10% of this plant should be allocated to nonregulated services in addition to regulated services. A study shows that 40% of its cost should be allocated to nonregulated services. If the entire account had an associated depreciation reserve of $60, the allocation of plant and reserve to regulated and nonregulated services would be as follows:

	Plant and Reserve			
	Total	*Regulated*	*Nonregulated*	*%Regulated*
UNIT A	$100	$90	10	
UNIT B	100	60	40	
Total Plant Account	200	150	50	75%
Reserve	60	45	15	75%

73. In this example, however, UNIT B was installed last month so virtually all $60 of the reserve is related[78] to UNIT A. It may therefore be more appropriate to allocate the $60 reserve $54 to regulated an $6 to nonregulated services, as UNIT A was allocated (as opposed to how the entire plant account was allocated.)

74. We are concerned that, in general, newer plant investment may have higher allocation percentages for nonregulated services while they have lower depreciation reserve percentages, and that, as a result, too little of the depreciation reserve will be allocated to regulated services. We solicit comment regarding how large a problem this poses and what procedures can be implemented to allow for a more reasonable allocation of the depreciation reserve between regulated and nonregulated activities.

7. Common costs incurred in holding companies and other telephone company affiliates.

75. The model cost allocation manual proposed under Alternative #1 deals only with those common costs which are incurred within telephone companies. Potentially significant common costs may, however, also be incurred in holding companies or other carrier affiliates. For example, a marketing group selling both the regulated services of a telephone company and the nonregulated products and services of a structurally separate affiliate could be

[78] Although in this example it is clear that the vast majority of the reserve is associated with UNIT A, in reality reserves are not maintainted by unit.

located in a division of the parent holding company. The portion of costs which such a marketing entity passes on to the telephone company will be determined based upon the holding company's allocation of those costs between regulated and nonregulated activities. As a means of assuring that ratepayers do not bear a disproportionate share of such common costs, we propose to require that all telephone company affiliates adhere to our cost allocation standards when allocating costs to regulated activities. We invite comment on this and other possible approaches to this problem.

III. TRANSACTIONS WITH AFFILIATES

76. We have long recognized the potential for cross-subsidization which lies in non-arms length transactions between regulated telephone companies and their nonregulated affiliates. In *Computer II* we addressed this problem by requiring transactions between separate subsidiaries and any other affiliates to be reduced to writing, filed with the Commission, and made available for public inspection. This rule, however, applied only to companies subject to structural separation, and only to transactions involving the Computer II subsidiary. We now propose to adopt accounting rules governing all transactions between regulated telephone operations and nonregulated divisions or affiliates.

77. As shown in Appendix 2, we are seeking comment on a proposal to add a new section 31.01-10 to the General Instructions of Part 31. Under the proposal, all transaction between the regulated activity and its affiliates would be recorded at market prices, provided those prices are determinative from prevailing price lists held out to the general public in the normal course of business or from tariffs on file with a regulatory commission. I fprices are not determinative from prevailing price lists or tariffs, however, assets or services purchased by the regulated activity from an affiliated entity would be recorded on the regulated books at the lower of their cost to the originating activity of the affiliated group less all applicable valuation reserves, or their fair market value. On the other hand, if assets or services not determinative from prevailing price lists or tariffs are sold by the regulated activity to the nonregulated activity the sale would be recorded on the regulated books at the higher of cost less all applicable valuation reserves, or the estimated fair market value.

78. In addition to the rules for recording transactions between the regulated entity and its affiliates, the proposed section 31.10-10 would also require the allocation of income taxes

between the regulated activity and its affiliates. Under the proposal, the income tax recorded by the regulated carrier would be the same as if it had been determined for the carrier separately. However, tax credits generated by carrier operations would be recorded by the carrier when used in the settlement of taxes by the affiliated group regardless of whether the carrier would have been able to use the credits itself as an independent entity during that period.

IV. ACCOUNTING FOR NONREGULATED ACTIVITIES

A. Background

79. This Commission has prescribed a Uniform System of Accounts for telephone companies for nearly as it has regulated interstate telephone service. During the first three decades of the USOA, few questions arose concerning the accounting treatment of investment, expenses, and revenues related to nontariffed, or nonregulated, activities.[79] Most of the nontariffed activities engaged in by telephone companies, such as tree-trimming for another utility or rental of building space were relatively small. These activities were traditionally treated as "incidental" to regulated operations, primarily because the costs associated with such activities were too small to warrant the expense and effort of accounting for them separately. The costs and revenues of incidental activities were simply left in the "above-the-line", i.e., operating, accounts in which they were initially entered. Any profits from incidental services served to lower the required return from regulated services. The scope and nature of incidental activity was such that this accounting treatment neither materially distorted the data used for ratemaking nor gave rise to concerns about undetected cost-shifting.

80. By contrast, in recent years telephone companies have greatly expanded their nonregulated activities, both by entry into lines of business not subject to tariff regulation and as a result of the deregulation of traditionally tariffed activities. We have increasingly required separate accounting as a means of identifying the costs of nonregulated activities and separating those costs from the costs which telephone companies are entitled to recover through the rates they charge for tariffed services.[80] For certain

[79] In our discussions in this NPRM we use the term "nonregulated activities" as it is currently used in Part 31: A nonregulated activity, product, or service is one which is not subject to a state or federal tariff filing requirement.

[80] In addition to the Computer II "separate books' requirements discussed below, *see* 47 C.F.R. Sec. 63.08 (d); Blanket Section 214 Authorization for Provison by

companies, under certain circumstances, we have reinforced accounting separation with varying degrees of structural separation.

81. The rules we adopted in the *First Computer Inquiry*[81] required common carriers that wished to enter the data processing business to do so through separate corporate affiliates, under conditions we described as "maximum separation". The separate affiliates were required to have separate books of account. The Computer I decisions were silent regarding accounting for any costs which might, under that version of structural separation, have been common to regulated operations and data processing.

82. In The *Second Computer Inquiry* we determined that CPE and enhanced services should be removed from tariff regulation at both the federal and state levels. We required AT&T to conduct its CPE and enhanced service operations through a structurally separate subsidiary.[82] We also ruled that all other carriers must maintain separate books of account for their nonregulated activities,[83] but we did not immediately address the form in which the separate books should be kept, nor did we establish the manner in which costs and revenues recorded in the separate books should be reflected in the prescribed accounts of the regulated company. In areas in which we expressly authorized the sharing of expenses between Computer II separate subsidiaries and their regulated

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a Telephone Common Carrier of Lines for its Cable Television and other Non-Common Carrier Services Outside its Telephone Service Area, 98 FCC 2d 354 (1984) (costs of providing lines for non-common carrier offerings and costs of providing such offerings must be entered in separate books of account); Policy and Rules Concerning Rates for Competitive Common Carrier Services, Fifth Report and Order, 98 FCC 2d 1191, 1198–99, para. 9 and n. 23 (separate books of account, but not structural separation, required for nondominant interstate, interexchange services of exchange telephone companies).

[81] Regulatory & Polciy Problems Presented by the Interdependence of Computer & Communications Services and Facilities, 28 FCC 2d 291 (1970) (Tentative Decision); 28 FCC 2d 267 (1971) (Final Decision), *aff'd in part sub nom.* GTE Service Corp. v. FCC, 474 F 2d 724 (2d Cir. 1973), *decision on remand*, 40 FCC 2d 293 (1973).

[82] In the Computer II Final Decision, we imposed structural separation requirements on AT&T and GTE, 77 FCC 2d at 466–75, but in the Reconsideration Order we concluded that the costs of applying those requirements to GTE exceeded the benefits, and therefore limited those requirements to AT&T, 84 FCC 2d at 72–73. We later applied modified structural separation conditions to the post-divestiture BOCs. BOC Separation Order, note 5, *supra*. As noted in para. 23, *supra*, we recently relieved AT&T of structural separation for its CPE operations and certain enhanced service offering in the AT&T Structural Relief Order. The necessity of structural separation for all enhanced services is currently at issue in the Third Computer Inquiry, note 4, *supra*. The application of structural separation to the BOCs' CPE operations is being examined in the BOC structural Separation proceeding, note 5, *supra*.

[83] 77 FCC 2d 384, 476.

affiliates, we required submission of accounting and cost allocation plans as part of the process of seeking approval for capitalization of the subsidiary.[84] From time to time we have also required submission of special accounting plans as conditions for waivers of structural separation[85] and, recently, as part of our action relieving AT&T of structural separation conditions.[86]

83. We first considered how to implement the Computer II "separate books of account" requirement in connection with the detariffing of telex CPE and enhanced services by the record carriers. In our October 1982 *Notice of Proposed Rulemaking* in Docket No. 82-678,[87] we proposed to prescribe in Parts 34 and 35 two new "below the line," or non-operating, accounts for detariffed CPE activities. A "Nonregulated Investments" account which would reflect the carrier's net investment in nonregulated activities including: (1) its permanent investments; (2) payables and receivables reflecting the transactions between regulated and nonregulated activities; and (3) current adjustment for net income or loss from nonregulated activities. Income or loss from nonregulated activities would also be entered in an account entitled "Income from Nonregulated Investments." The detailed records of CPE activities would be kept in separate books of accounts in the form chosen by the carrier. The prescribed accounts would reflect as much information about the nonregulated CPE enterprise as was needed for regulatory purposes.

84. We originally intended that this accounting plan would result in the removal from the operating accounts of all costs associated with nonregulated activities, including the nonregulated portions of any common investment. However, it soon became apparent that we would not be able to adopt cost allocation rules for the record industry at the same time that we adopted the new accounting rules.[88] We decided that, until cost

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[84] *See* Part II, *supra, paras. 26-27.*

[85] *See* Part II, *supra, para. 29.*

[86] *See* Part II, *supra, para. 81.*

[87] Notice of Proposed Rulemaking, 47 Fed. Reg. 44781 (October 12, 1982).

[88] Amendment of Part 34, Uniform System of Accounts for Radiotelegraph Carriers, and Part 35, Uniform System of Accounts for Wire-Telegraph and Ocean-Cable Carriers of the Commission's Rules and Regulations and Conforming Amendment to Annual Reports Form 0 for Wire-Telegraph and Ocean-Cable Carriers of the Commission's Rules and Regulations and Conforming Amendments to Annual Reports Form 0 for Wire-Telegraph and Ocean-Cable Carriers and Form R for Radiotelegraph Carriers with Respect to Accounting For Carriers' Nonregulated Activity, FCC 83-398 (released September 21, 1983), at paras 42-52.

allocation procedures were in place, it would be inappropriate to require the removal from operating investment accounts of amount representing nonregulated use of common plant. Accordingly, in September 1983, when we adopted the proposed amendments to Part 34 and Part 35, we required as an interim measure that investment used in common by regulated and nonregulated activities be left in the accounts for regulated operations.[89] Only investment used solely for nonregulated purposes was to be transferred to the new account for nonregulated investments. All nonregulated expenses, however, were to be transferred to the accounts for nonregulated activities, as initially proposed.

85. In June 1983, while our NPRM in Docket 82-678 was still pending, we issued a Notice of Proposed Rulemaking in the *Implementation Proceeding*.[90] We proposed to adopt for the nonregulated activities of telephone companies essentially the same accounting system we were proposing for the record industry in Docket 82-678. We adopted that proposal in the Fifth Report and Order.[91] The accounting rules prescribed therein went into effect in May 1985.

B. The Implementation Proceeding (Fifth Report and Order)

86. In the Fifth Report and Order in the *Implementation Proceeding* we prescribed two new Part 31 accounts for nonregulated activities. Account 106 is an asset account entitled "Nonregulated Investment." Account 317 is a profit and loss account entitled "Income form nonregulated activities." Section 31.106 of the Commission's Rules specifies the use of Account 106 as follows:

> a) This account shall include all of the carrier's investment in physical property, both in service and in stock, together with related allowance for depreciation that is used or held entirely for other than regulated communication services. It shall include the amount of all assessments for the construction of public improvements levied against nonregulated physical property utilized in nonregulated operations. This account shall include, as a receivable, costs including taxes incurred on behalf of nonregulated operations, and, as a payable, costs incurred by the nonregulated business on

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[89] *Id.* at para. 52. This interim requirement remains in place for the record industry. In the instant proceeding we are proposing for telephone companies new rules for accounting for plant used in common by regulated and nonregulated activities. Should we adopt any of these rules into Part 31, we intend to propose similar changes to Parts 34 and 35.

[90] Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), Notice of Proposed Rulemaking, 48 Fed. Reg. 29891 (June 21, 1983).

[91] Note 4, *supra*.

behalf of regulated operations. This account shall reflect net income or loss on nonregulated activity.[92]

Section 31.317 describes the use of Account 317 as follows:

(a) This account shall be used by those companies who, according to our rules, can engage in offering customer premises equipment, and enhanced services and other nonregulated activities without establishing a separate subsidiary for that purpose.

(b) All revenues and expenses (including taxes) incurred in these nonregulated activities shall be recorded on separate books of account for such operations. [Only the net of the total revenues and total expenses shall be recorded in this account.][93]

In conjunction with these rules, we adopted the following definitions of "nonregulated activities" and "regulated telephone service":

"Nonregulated activities" refers to those activities of a subject telephone company which are not common carrier telecommunications products and services subject to the tariff requirements as contained in Title II of the Communications Act of 1934, as amended, and common carrier telecommunications products and services tariffed by the state commissions.[94]

"Regulated telephone service" refers to those activities of subject telephone companies that are subject to the tariff filing requirements of Title II of the Communications Act of 1934, as amended, and common carrier telecommunications products and services tariffed by the state commissions.[95]

87. Under this system, costs associated with nonregulated activities are initially recorded directly in the nonregulated set of accounts or in accounts for regulated operations, depending on the nature of the cost and on how it is incurred. All nonregulated costs which are initially recorded in accounts for regulated operations, except for costs representing the nonregulated shares of investments in items of common plant, are transferred to Account 106 at the end of each month. The effect of the above accounting is to require the carriers to establish separate accounting divisions or entities for those nonregulated activities which are not conducted through separate corporate entities.

C. Why We are Proposing to Clarify and Amend the Implementation Proceeding Accounting Rules

1. Matters left unresolved

[92] 47 C.F.R. Sec. 31.106(a).
[93] 47 C.F.R. Sec. 31.317.
[94] 47 C.F.R. Sec. 31.01-3 (x).
[95] 47 C.F.R. Sec. 31.01-3(cc).

88. In the *Implementation Proceeding* this Commission prescribed the USOA accounts needed to implement the Computer II "separate books of account" requirement, but we did not complete the task of developing a system for the accounting separation of regulated from nonregulated costs. Most notably, we deferred to a future proceeding the cost allocation issues which we addressed in Part II of the instant NPRM. That decision also left unspecified the mechanism by which portions of common plant allocated to nonregulated service would be removed from the ratemaking process.[96]

2. Problems which have arisen in applying the definitions of "nonregulated activity" and "regulated telephone service."

89. The rules adopted in the *Implementation Proceeding* define "regulated telephone service" as activity which is subject to state or federal tariff filing requirements.[97] All other telephone company activities fall under the definition of "nonregulated activities." It is clear that under these definitions, CPE and enhanced services are "nonregulating activities", and that this Commission intended accounts 106 and 317 to be used for these activities. Questions have arisen, however, concerning whether we intended this treatment for all other types of activities which are not subject to tariff filing requirements.

90. *Treatment of Incidental Activities.* In a petition seeking clarification of the Fifth Report and Order, a group of Bell operating telephone companies asked whether we intended to require use of accounts 106 and 317 for nontariffed services offered incidental to tariffed service.[98] They observed that Section 31.5-50 of our Rules instructs carriers to include revenues from such incidental services in operating revenue accounts, while the Fifth Report and Order implies that separate accounting must be used for all activities that are not subject to tariff requirements. We agreed that there was need for additional guidance in areas

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[96] This does not imply that companies are now free to include nonregulated portions of common plant in the costs which they recover under tariff rates. Pending resolution of the outstanding cost accounting issues, carriers are required to allocate costs to nonregulated activities on a fully distributed basis, and maintain cost and usage records to support their allocations. Implementation Proceeding, Fifth Report and Order, para. 25. *See also* New Jersey Bell Telephone Company, Petition for Waiver of Section 64.702 of the Commission Rules (Computer II), Mimeo No. 0426 (released October 24, 1985) at paras. 30-34.

[97] Para. 86, *supra.*

[98] Implementation Proceeding, Memorandum Opinion and Order, FCC 85-518 (released September 27, 1985).

other than CPE and enhanced services, and indicated that we would examine possible refinements of the definition of "incidental activities" in the instant proceeding. We stated that, in the meantime, activities traditionally viewed as incidental need not be removed from regulated accounts. Carriers were instructed, however, to treat as "nonregulated activities" any activity which (a) could be considered a line of business, or (b) could have a material impact on operating accounts.[99] In section D.1, below we seek comment on a proposal for the accounting treatment of incidental activities.

91. *Treatment of basic services detariffed by a state.* In the short time since we adopted the accounting rules in the *Implementation Proceeding*, a new phase in the deregulation of telecommunications has begun. Several states have begun the process of removing from regulation certain traditionally tariffed, basic transmission services. One state, Iowa, has already put into effect a plan for the deregulation of Centrex and of Hi-Lo Capacity Intraexchange and Hi-Capacity Interexchange Private Line Digital Services.[100] Under a literal reading of our accounting rules a carrier might have to use accounts 106 and 317 for such nonregulated, basic services, since the services would not be tariffed with this Commission or a state commission. This Commission, however, has never considered the implications of requiring "separate books" treatment of services such as Centrex, and we are not aware of any company which is now using accounts 106 and 317 to account for detariffed basic service. We seek comment below on the accounting issues raised by deregulation of formerly tariffed basic transmission services.

3. Problems with the current treatment of investment in common plant

92. As explained above, our accounting rules treat investment in common plant differently from any of the other costs of nonregulated activities. Common plant remains in accounts for regulated activities, while common expenses, including expenses related to common plant, are transferred to account 106 each month. Furthermore, the net income produced by the nonregulated use of common plant is recorded only in accounts 106 and 317. This disparate treatment of common plant, on the one hand, and the revenues and expenses associated with that

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[99] *Id.* at para. 15.

[100] Joint Plan for Deregulation, Docket __-84-8, Iowa State Commerce Commission (April 1, 1985).

plant, on the other hand, disrupts the relationship among the investment, expense, and net revenue accounts of the company's regulated services. This effect will become more pronounced if more enhanced and other nonregulated services come to be offered through integrated telecommunications networks, and more telecommunications network plant[101] comes to be "common plant."

93. The trend toward integrated services networks also raises the question whether it is appropriate to record in separate books of account, and reflect in account 106, investments in items of plant which are used solely for nonregulated activities, but which are logically and physically part of the telecommunications network. It is possible that significant amounts of investment in, *e.g.*, central office equipment, could one day be recorded in separate books. If this should occur, we might find it difficult to monitor the allocation of common costs, such as land, buildings, or power equipment, which might be allocated based on plant investment used to provide regulated and nonregulated services. This is because financial data essential to tracking the results of such allocations would not appear in the account 106, and would appear in usable form in the separate books only if the carrier voluntarily chose to keep its nonregulated plant accounts in the same form as its regulated plant accounts. It is also possible that very little telecommunications network plant will be used solely for nonregulated activities, in which case little good would seem to be accomplished by through separate accounting.

94. In Section D. 2., below, we seek comment on alternative solutions to the problems in our current treatment of common plant.

D. Proposal

1. "Nonregulated Activities"

95. We developed the accounting approach of the *Implementation Proceeding* to separate the costs of regulated services from the costs of providing CPE and enhanced services. In so doing we adopted accounting rules which were couched in terms equally applicable to all nonregulated activities. There are, however, several different kinds of nonregulated activities. A nonregulated activity may be a business enterprise such as real estate development, which has never been subject to tariff regulation, or

[101] In this proceeding we define "telecommunications network plant" as all plant which, if used to provide regulated telephone service, would be recorded in accounts 221 (central office equipment) and 241-244 (outside plant).

an activity such as trimming trees for utility companies, which is engaged in incidental to regulated activities. It could be a preemptively deregulated activity like CPE; a traditionally regulated service such as Centrex, which a state has removed from regulation; or a formerly regulated activity such as billing and collections, which has been deregulated in the federal jurisdiction only. A service may have been removed form tariff regulation because it was determined not to be a common carrier service, or it may be a service which remains subject to common carrier obligations. It may be wholly severable from the telecommunications network or intertwined with the network.

96. It is our tentative conclusion that a single nonregulated accounting scheme automatically invoked by operation of an inclusive definition of "nonregulated activity", may not be appropriate for every possible types of nonregulated activities. We therefore propose to amend part 31 in such a way as to allow us to determine separately what should be the accounting treatment for each of the following types of nonregulated activity: (1) incidental activities, (2) activities which were never subject to tariff regulation, (3) activities preemptively detariffed by this Commission; (4) activities detariffed by this commission in the interstate jurisdiction only, (5) activities detariffed in a state jurisdiction.

97. *Incidental Activities.* We propose to continue the traditional accounting treatment of incidental activities. We propose to adopt the following criteria for determining whether an activity is "incidental".

(a) The activity should be an outgrowth of regulated operations.

(b) The revenues from all incidental activities should not exceed .05% of the operating company's total revenues.[102]

Application of nonregulated accounting treatment to an activity usuallly implies accounting separately for the costs and revenues of that activity, allocating a full share of common costs to that activity, and excluding the costs of that activity from the jurisdictional separations process. This process is not without cost, but in most cases the costs are justified by the benefits which flow from exposure and deterence of potentially harmful subsidization of nonregulated activities. It is our tentative conclu-

[102]We would not, however, require a carrier to change the accounting treatment on any incidental activity unless the total of all incidental revenues exceeded .05% for three consecutive years. This will allow for unusual circumstances which might cause incidental revenues to be abnormally high in a single year.

sion that activities which meet the proposed criteria for incidental status pose so little threat of harm from cross subsidization that the benefits of accounting for such activities would be very small and would be outweighed by the burdens that a separate accounting requirement would impose on a carrier. We seek comment on the general pertinence and sufficiency of these criteria, and on the following specific matters: What activities are currently accounted for as "incidental"? Which, if any, of these would not qualify as "incidental" under our proposed criteria? Should we require the direct costs of incidental activities to be captured, either in separate subaccounts, or in subsidiary records?

98. *Activities never subject to tariff.* We believe that, in most cases, telephone companies will choose for business reasons to engage in activities such as real estate brokerage, apartment leasing, credit financing, etc., through separate corporate entities. Our rules, however, do not require them to do so. We propose to continue the current requirement that telephone companies engaged in these traditionally nonregulated activities maintain separate books of accounts and allocate to those activities a fully distributed share of common costs.

99. *Preemptively deregulated activities.* To date, this Commission has preemptively deregulated two categories of telephone company service: provision of CPE and provision of enhanced services. As noted previously, our current accounting rules for nonregulated activities were designed primarily for these activities. We propose to continue to require application of our nonregulated accounting and cost allocations rules for CPE and enhanced services.[103]

100. *Activities detariffed in the federal jurisdiction only.* Recently this Commission decided that, because billing and collection services are not "communications common carriage", these services should be removed from tariff in the interstate jurisdiction as of January 1, 1987. We did not, however, preempt state regulation of interstate billing and collections. Pending adoption of generic cost allocation rules in the instant proceeding, we requested local exchange carriers to calculate the costs of interstate billing and collections in compliance with Parts 67 and 69 or our Rules.

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[103]We note that accounting alternative #2, below, would change the manner in which telephone companies record costs for some enhanced services. Under both accounting proposals, however, the cost of enhanced services would continue to be excluded from jurisdictional separations.

101. Separate accounting and fully distributed cost allocations may or may not be appropriate for some services which we might detariff in the interstate jurisdiction. It is our tentative conclusion that, when we detariff an interstate service, we should consider whether different costing and acounting approaches might improve consumer welfare. For example, for a mature service with a percentage of common costs, we might consider allowing the same treatment we are proposing for incidental services. That is, incremental costing would be permitted, but all revenues would remain in operating accounts. We invite comment on the desirability of a case-by-case approach to detariffed interstate services. We have tentatively concluded that costs attributable to unregulated billing and collection for interstate services should be removed after rather than before investment and expense has been apportioned in accordance with jurisdictional separations procedures. If this procedure is adopted, the part 69 apportionment procedures could be used to determine costs attributable to an interstate billing and collection category. Other procedures such as marginal costing could also be used. We invite comment on this proposal.

102. *Basic services detariffed by a state.* Our current accounting rules, read literally, could treat detariffed basic services the same as any nonregulated activity. We believe that this result probably would not be appropriate, particularly for detariffed local exchanged services such as Centrex. Requiring "separate books of account" treatment for such services would lead to removal of potentially significant amounts of local exchange plant from the jurisdictional separations process. Thus, if a state regulatory commission has removed Centrex from all regulation in order to allow the company to compete with PBX vendors, changes in interstate cost allocations could adversely affect rates for local exchange services. By contrast, in a state where the commission has chosen to use flexible tariffs, special construction tariffs, customer specific tariffs, or marginal costing as a means of allowing Centrex prices to meet competition, interstate allocations would be maintained.

103. We do not wish to discourage states from experimenting with deregulation. Nor do we wish, on the other hand, to perpetuate a situation in which companies apparently feel justified in accounting for detariffed services in ways which vary from the requirements of Part 31. One approach we might take is to amend our rules for accounting for, and allocating costs to, non-regulated

activities so that those rules do not apply to services deregulated by a state. Under this approach each state commission would determine how costs of detariffed intrastate services would be identified and removed from the total of costs assigned to intrastate jurisdiction. Another approach might be to retain a requirement that our separate accounting and cost allocation rules be used for detariffed service, but to allow waivers of that requirement. Under this approach we would decide on a case-by-case basis what accounting and cost allocation treatment should apply to each detariffed service. We seek comment on these approaches, and on the other issues raised by the detariffing of basic services.

2. Treatment of Common Plant

104. In an accounting separation scheme built around the use of "separate books of account" for nonregulated activities, the costs and revenues of nonregulated activities are supposed to be removed from the ratemaking process by the accounting system itself. That is, after books are closed each month, all costs and revenues associated with nonregulated activity are supposed to be in accounts which are not used in ratemaking. As discussed above, our current "separate books of account" system is incomplete in that it does not provide for removal from operating (i.e., ratemaking) accounts of the costs of nonregulated use of common plant. Indeed, since the investment in a single item of common plant could not, consistent with good accounting principles, be split between operating and non-operating accounts, "separate books" alone could never completely separate regulated from nonregulated costs. We need, therefore, additional mechanisms for assuring that plant investment which is allocable to nonregulated activities, but which remains in operating acounts, is not recovered through rates for tariffed services.

105. We seek comment on two alternative mechanisms for separating the cost of common plant between regulated and nonregulated activities. The first, which is based on a proposal recommended by the TIAG, utilizes the existing "separate books of account" approach.[104] The second would abandon the use of

[104]TIAG was established to assist the Commission in drafting a revised Uniform System of Accounts. Revision of the Uniform System of Accounts (Second Supplemental Notice), 88 FCC 2d 83 (1981). TIAG's report on determination of nonregulated costs in regulated entites, discussed in more detail in para. 34, *supra*, was submitted to the Commission in September 1984. It contained both an accounting proposal and a cost allocation proposal TIAG referred to these proposals collectively as "Part X".

separate books of account for those nonregulated activities which use the telecommunications network to provide service to customers.

106. *Alternative #1.* Under this proposal, all common expenses initially recorded in operating accounts would be credited to those accounts and debited to account 106 just as they are now. Nonregulated use of common plant would be accounted for by compensating the regulated activities for that use. The compensation amount would be charged as an expense to account 106 and credited as income to account 526, other operating revenues.[105]

107. The amount of compensation would be calculated as follows: the carrier would apply the cost allocation standards and procedures proposed in Part II of this NPRM to determine how much of the investment in common plant should be attributed to nonregulated activities; the carrier would then apply the authorized interstate rate of return[106] and income tax factors to that portion of investment. TIAG characterized the outcome of these procedures as follows:

> Upon completion of the accounting required by [this proposal], the entity's total operations have been completely divided between its regulated and nonregulated activities, i.e., the entity's regulated expense accounts now reflect only "net regulated" amounts, the detailed regulated plant accounts contain both the regulated and common investment and, finally, the income has been recognized to fully compensate the entity for the use of the common investment by the nonregulated activity. In other words, separate segments, i.e., regulated and nonregulated, have been reflected on the entity's books of account. The regulated activities accounts are ready to be jurisidictionally separated and assigned to service categories.[107]

108. The most attractive features of the TIAG proposal are that it can be implemented relatively easily, and that it does not require amendment of our accounting rules. Indeed, the Common Carrier Bureau has already required one company, New Jersey Bell, to use essentially this approach in accounting for common plant used for both protocol conversion, an enhanced service, and basic packet switching.[108] It could meet our immediate need for an accounting mechanism to deal with the relatively small

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[105]If we were to adopt this proposal a change in jurisdictional separation procedures could be required to properly separate these revenues between state and interstate jurisdictions. In the TIAG proposal, which is geared to the proposed Part 32, the compensation amount is credited to a special account entitled "Return from Nonregulated Use of Regulated Facilities."

[106]TIAG proposed use of the realized rate of return on average total capital for this calculation.

[107]TIAG Report at 11.

[108]*See* n. 59, *supra.*

amounts of common plant which, we believe, are now present in the operating accounts of telephone companies. However, in order to facilitate application and monitoring of the cost allocation standards and guidelines which we are proposing in Part II, herein, we would add to the basic TIAG proposal a recordkeeping requirement intended to assure that data necessary to make cost allocations will be preserved. Specifically, we propose to require companies which have recorded in their separate books of account any investment which is dedicated to nonregulated use, but which would have been recorded in operating accounts if used for regulated services, to maintain subsidiary records in which that nonregulated investment is listed according to Part 31 accounts and subaccounts.[109] We seek comment on whether this recordkeeping requirement will provide us with data sufficient to allow us to determine, on audit, whether plant dedicated to nonregulated use is included in all relevant allocation pools and whether such plant receives its fair share of plant-related common expense.

109. While we find the TIAG proposal, with the modifications we have made to it, acceptable in the short term, we believe that at some point it will be undesirable to impute to significant amounts of plant investment, a rate of return which might be wholly unrelated to the actual performance of that investment. For this reason, we have developed an alternative proposal, set out in the next section, which does not rely on entering hypothetical amounts in the financial accounts to prepare those accounts for the separations process.

110. *Alternative #2.* The TIAG proposal was drafted based on the assumption that all uses of common plant could be characterized as either shared administration services or as construction, maintenance, support, and removal of dedicated, nonregulated plant. As discusses above, however, we see a trend toward common use of integrate telecommunications networks to provide both regulated and nonregulated service. We are concerned that continued use of separate books of account for this type of nonregulated activity would distort the relationships between investment and expense accounts, thereby compromising the integrity and usefulness of the financial data presented by the USOA accounts. We also believe that it may be inconsistent with

[109] Account 106.1 "Permanent investment" does not break out investment in this fashion. Furthermore, while some companies may now keep their separate books of account in a form which parallels Part 31, we do not currently require them to do so.

our current concept of a financial accounting system, as expressed in our proposal for a revised USOA, to expect the accounting system alone to separate the costs of various services provided using the same facilities.

111. We therefore seek comment on an alternative which would not use separate accounting books for costs and revenues associated with services provided by the integrated telecommunications network. Under this proposal a carrier would use operating accounts for all of its network services[110] and non-operating accounts (i.e., accounts 106 and 317) for its non-network (*e.g.*, real estate, CPE, etc.) services. This procedure and its relationship to jurisdictional separations is as follows:

1) Costs associated with non-netowrk services will be treated the same way as they would be treated under the TIAG proposal above.

2) After closing its books the carrier would assign and allocate the costs and revenues associated with the network services between its regulated and nonregulated operations, following the procedures set out in its cost allocation manual. Costs attributable to nonregulated services would be removed from operating accounts prior to jurisdictional separations, but would remain in the books of accounts for financial purposes. The carrier would routinely report the regulated and nonregulated network amounts to the Commission.[111]

3) Part 67, i.e., jurisdictional separations procedures, would then be applied to the regulated network service amounts.

The allocations referred to in steps 1 and 2, above, would be based upon the procedures proposed in Part II of this NPRM.

112. This proposal would require a rule change because our current rules call for the use of non-operating accounts (i.e., accounts 106 and 317) for reflecting all costs and revenues associated with nonregulated activities, while this proposal calls for the use of these accounts for recording costs and revenues associated with non-network activities.

113. We believe that alternative #2 has two major benefits when compared with our current rules and with alternative #1. First, the allocation procedures proposed in Part II will provide more reliable allocations using alternative #2 than under the other methods, because in this alternative all network investments are

[110]"Network services" are services provided to customers through use of network plant. "Network Plant" is central office equipment (acount 221) and outside plant (accounts 240–244).

[111]The Commission plans to initiate a proceeding to establish detailed reporting requirements for various carriers. The reporting referred to here will be a part of that proceeding.

included in the operating accounts, not just the regulated and common investments. This is important because the allocation of much of the support costs is based upon the allocation of the investments. If some of the investments are excluded, improper allocation of support costs may result. Second, we believe that, by having the financial books of account reflect all network operations, we will be able to monitor the industry, and its progress toward deregulation, better than if the books reflect only regulated operations. We seek comment on this proposal, and on any modifications or altenatives which might better achieve the goals of this proceeding.

V. OTHER MATTERS

114. *Applicability to small telephone carriers.* We certify that the Regulatory Flexibility Act is not applicable to the rules we are proposing in this proceeding. Although some local exchange carriers are very small, local telephone companies do not appear to fall within the Regulatory Flexibility Act's definition of a "small entity." The Act incorporates the definition of a "small business" in Section 3 of the Small Business Act as the definition of a "small entity." The latter definition excludes any business that is dominant in its field of operation. Exchange carriers, even small ones, enjoy a dominant monopoly position in their local service area. The Commission has found all exchange carriers to be dominant in the *Competitive Carrier* proceeding, 85 FCC 1, 23-24 (1980). To the extent that interexchange carriers are affected by these rules, we hereby certify that these rules will not have significant economic effect on a substantial number of small entities. At the time of publication of this notice in the Federal Register, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

115. Although we need not comply with the formal requirements of the Regulatory Flexibility Act, we do recognize that the proposals we have put forth for comment herein were developed with the larger telephone companies in mind. Parts of these proposals may present special difficulties for very small companies. Indeed, it is possible that, for companies below a certain size, the costs to the company and to this Commission outweigh the benefits. We therefore solicit comment on the extent to which any rules adopt in this proceeding should include modifications or exceptions for small telephone companies.

116. *Paperwork Reduction Act.* The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements or burdens upon the public. Implementation of any new or modified requirements or burden will be subject to approval by the Office of Management and Budget as prescribed by the Act.

117. *Ex parte contacts.* For purposes of this nonrestricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any wirtten or oral communication (other than formal written comments or pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff, which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepares written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's rules, 47 C.F.R. 1.1231.

118. Copies of the TIAG report mentioned herein may be obtained from the Commission's contractor for public records duplications, International Transcription Services, Inc. 4006 University Drive, Fairfax, Virginia 22111, telephone in Virginia (703) 352-2400, in the District of Columbia (202) 296-7322. The contractor also maintains space in Room 246 at FCC headquarters, 1919 M Street, N.W., Washington DC 20554.

VI. ORDERING CLAUSES

119. ACCORDINGLY, IT IS ORDERED, pursuant to the provisions of Section 4(i) 201(b), 218, 219, and 220(a) of the Communications Act of 1934, as amended, 47 U.S.C Secs. 154(i), 201(b), 218, 219 and 220(a), that there IS HEREBY INSTITUTED a notice of proposed rulemaking into the foregoing matters.

120. IT IS FURTHER ORDERED, that interested persons may file comments on the proposals discussed in this Notice on or before June 30, 1986. Reply comments shall be filed on or before July 30, 1986. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, 47 C.F.R. 1.419, an original and five (5) copies of all comments shall be furnished to the Commission. Copies of the comments will be available for public inspection in the Commission's Docket Reference Room, 1919 M Street, N.W., Washington, D.C.

121. IT IS FURTHER ORDERED, pursuant to Section 220(i), that the Secretary shall serve a copy of this Notice on each state commission.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

COST ALLOCATION GUIDELINES

Account	*Account Numbers*	*Allocation Procedure*
Outside Plant	241-244	Categorize as Loop and Trunk. Allocate each category on the basis of its relative use (and distance) determined from detailed analysis of the cable plant.
Central Office Equipment	221	Categorize as Manual Switching, Automatic Message Recording, Local Dial Switching, Other Switching, Exchange Circuit, and Interexchange Circuit. Allocate each category based on its relative use determined from detailed analysis of the equipment.
Station Equipment and Connections	231-5	Allocate based upon its relative use determined from detailed analysis of loop plan.

Account	*Account Numbers*	*Allocation Procedure*
Land and Buildings	111,121	Categorize as Central Office, Commercial, and Administrative & Other. Allocate the Central Office category based on the separation of Central Office Equipment. Allocate Commercial category based on analysis of Commercial expenses. Allocate Administrative & Other category using the General Allocator.
General Use Equipment	261-264	Categorize as Plant-related or Administrative. Allocate Plant-related category based on total plant in service (i.e., excluding accounts 261-264). Allocate Administrative category based on the General Allocator.
Other assets	201,203 276,277 100.2,100.3 100.4,122	Allocate based upon the separation of total plant in service.
Depreciation Reserve	171	Categorize by depreciation study category. Allocate each category based upon the separation of plant in service by category.
Amortization Reserve	172	Categorize by depreciation study category. Allocate each category based upon the separation of plant in service by category.
Accumulated Defered Income Taxes-Accelerated Tax Depreciation	176	Categorize by depreciation study category. Allocate each category based upon the separation of plant in service by category.
Revenues	500-530	Allocate based upon detailed analysis of billing records.
Repairs of Outside Plant	602	Allocate based upon the separation of total Outside Plant.
Test Desk Work	603	Allocate based upon the separation of total Outside Plant and General Office Equipment.
Repairs of Central Office Equipment	604	Allocate based upon the separation of total Central Office Equipment.
Repairs of Station Equipment and Public Telephones	605,607	Allocate based upon the separation of Station Equipment.
Repairs of Buildings and Grounds	606	Allocate based upon the separation of total Land and Buildings.

Account	*Account Numbers*	*Allocation Procedure*
Maintaining Transmission Power	610	Allocate based upon the separation of total Central Office Equipment.
Employment Stabilization; Other Maintenance Expense	611,612	Allocate based upon the separation of the maintenance expenses listed above (i.e., 602–610).
Depreciation Expense	608	Categorize by depreciation study category. Allocate each category based the separation of plant in service by category.
Extraordinary Retirements	609	Allocate based upon analysis of retirement date.
Amortization of Intangible Property	613	Allocate based upon analysis of charges.
Amortization of Telephone Plant Acquisition adjustments	614	Allocate based upon the separation of total plant in service.
General Traffic	621	Categorize as Engineering & Network Administration and Other. Allocate Engineering & Network Administration category based upon the separation of total plant in service. Allocate the Other category based upon the separation of the COE-Manual Switching plant category.
Service Inspection and Customer Instruction	622	Use General Allocator.
Operator Wages, Rest and Lunch Rooms, Operator's Employment and training.	624,626 627	Allocate based upon separation of the COE-Manual Switching plant category.
Central Office Stationery and Printing, Central Office House Service and Miscellaneous Central Office Expenses	629,631	Allocate based upon the separation of total Central Office Equipment.
Public Telephone Expense	632	Allocate based upon the separation of Station Equipment.
Other Traffic Expense and Joint Traffic Expense	633,634,635	Allocate net expense based upon the separation of the all other traffic expense accounts (i.e., 621–633).

Account	*Account Numbers*	*Allocation Procedure*
General Commerical Administrative Expense, Advertising, Sales Expense, Local Commercial Operations, Public Telephone Commissions, Directory Expense, and other Commercial Expense.	640,642, 643,645, 648,649, 650	Allocate based upon analysis of costs. Costs in these accounts are treated as a single cost pool. Costs are directly assigned or allocated according to direct or surrogate measures of use to the extent possible. Residual marketing costs are allocated in the same ration as costs which were so assigned or allocated.
Connecting Company Expense	644	Allocate based upon analysis of costs.
General Expenses	661-669 675,677	Use General Allocator.
Operating Rents	671	Allocate based upon analysis of rental facilities (as if owned).
Relief and Pensions	672	Allocate based on direct wages.
Telephone Franchise Requirements	673,676	Allocate net costs based upon the separation of total plant in service.
General Services and Licenses	674	Allocate based upon analysis of costs.
Other Operating Taxes	307	Categorize as Ad Valorem, Social Security, State and Local Income Taxes, and Other. Allocate Ad Valorem taxes based upon the separation of total plant in service. Allocate Social Security Taxes based on direct wages. Allocate State and Local Income Taxes based upon the separation of Net Revenues less Income Charges, Other Taxes, and Income Adjustments. Allocate Other Taxes using the General Allocator.
Accelerated Depreciation Income Tax Deferrals and Credits.	308,309	Allocate based upon separation of total plant in service.
Federal Income Taxes	306	Allocate based upon the separation of Net Revenues less Income Charges, Other Taxes, and Income Adjustments.

APPENDIX B

RULES FOR TRANSACTIONS WITH AFFILIATES

31.01-10 *Transactions with Affiliates*

(a) Unless otherwise approved by the Chief of the Common Carrier Bureau, transactions between the regulated activity of a telephone company and activities conducted by nonregulated divisions or by other corporate members of the carrier's affiliated group shall be recorded by the carrier in its regulated accounts as provided in paragraphs (b) through (e) below.

(b) Charges for services and assets purchased by or transferred to the regulated telephone activity of a telephone company from other activities of the carrier's affiliated group shall be recorded in the operating accounts of the regulated activity at the invoice price if that price is determined by a prevailing price list held out to the general public in the normal course of business. Where the services and assets received by the regulated activity are not marketed by the affiliated supplier to the general public under a prevailing price list, the charges recorded by the regulated activity for such services and assets shall be the lower of their cost to the originating activity of the affiliated group less all applicable valuation reserves, or their fair market value.

(c) Services and assets sold by or transferred from the regulated activity to other activites of the carrier's affiliated group shall be recorded as operating revenues, incidental revenues, or asset retirements according to the nature of the transaction involved. Where such services or assets are reflected in tariffs on file with a regulatory commission or in price lists held out to the general public, the associated revenues shall be recorded at the prices contained therein in the appropriate revenue accounts. Where no tariff or prevailing price list is applicable, the proceeds for the sale or asset retirement shall be recorded at the higher of cost less all applicable valuation reserves, or estimated fair market value of the asset or service involved.

(d) Income taxes shall be allocated among the regulated activities of the carrier, its nonregulated divisions, and members of an affiliated group. Under circumstances in which income taxes are determined on a consolidated basis by the carrier and other members of an affiliated group, the income tax expense to be recorded by the carrier shall be the same as would result if determined for the carrier separately for all time periods, except that the tax effect of carry-back and carry-forward operating losses, investment tax credits, or other tax credits generated by operations of the carrier shall be recorded by the carrier during the period in which applied in settlement of the taxes otherwise attributable to any member, or combination of members, of the affiliated group.

(e) The principles set forth in this Section 31.01-10 shall apply equally to corporations, proprietorships, partnerships, and other forms of business organizations.

Common Carrier, Domestic
Fixed Radio Services
Rulemaking, Notice of Proposed

Notice of Proposed Rulemaking adopted seeking to revise Part 21 of Commission's Rules which governs construction, licensing, and operation of common carrier domestic fixed radio facilities. Proposals are designed to update and simplify the rules and eliminate requirements that are no longer necessary to an efficient and orderly licensing system.
—Domestic Fixed Radio
CC Docket No. 86-128

FCC 86-154

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Revision of Part 21 of the Commission's Rules.	CC Docket No. 86-128

NOTICE OF PROPOSED RULEMAKING

Adopted April 8, 1986; Released April 11, 1986

BY THE COMMISSION:

I. Introduction

1. In this notice, we propose to revise Part 21 of the Commission's Rules, which governs the construction, licensing, and operation of common carrier domestic fixed radio facilities. Some of the revisions proposed herein were previously proposed in Docket 20490.[1] Since that docket was opened, however, a number of important changes have occurred in the structure of the domestic common carrier radio industry, the Communications Act, and our own regulations. Most significantly, increased competition

[1] *See* Domestic Pub. Fixed Radio Servs., 55 FCC 2d 36 (1975) (First Report & Order), *modified*, 76 FCC 2d 273 (1980) (Second Report & Order). Because we are incorporating most of the remaining proposals into the present proceeding, we are by separate order terminating Docket 20490.

in the communications marketplace[2] has permitted the Commission to take several actions to deregulate competitive providers of service.[3] In addition, we have introduced new services, including the Digital Electronic Message Service (DEMS)[4] and Multichannel Multipoint Distribution Service (MMDS),[5] which have substantially affected the regulations in Part 21. Other changes in Part 21, some of which were made possible by changes enacted in the Communications Act, include frequency allocations for 18 GHz services,[6] a reduction in operator license requirements,[7] and the adoption of a lottery system for MMDS and DEMS applications.[8] Because of these changes and our desire to make our licensing procedure as efficient as possible for carriers and the Commission, we hereby propose a comprehensive revision of Part 21. Our proposals are designed to update and simplify the rules and to eliminate those requirements that appear to be no longer necessary to an efficient and orderly licensing system.

2. The comprehensive revision we are proposing is consistent with our mandate under the Communications Act to promote the public interest, convenience and necessity. 47 U.S.C. §§ 214, 307. We have determined that the introduction of competition in the provision of services, including common carrier microwave services, is in the public interest. Accordingly, we have encouraged competition in the provision of point-to-point microwave service,[9]

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[2] *See, e.g.*, Resale and Shared Use of Common Carrier Servs. and Facilities, 60 FCC 2d 261 (1976), *modified*, 62 FCC 2d 588 (1977), *aff'd sub nom.* AT&T v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978).

[3] *See* Competitive Carrier Rulemaking, First Report and Order (hereinafter Competitive Carrier), 85 FCC 2d 1 (1980), Second Report and Order, 91 FCC 2d 59 (1982), *recon. denied*, 93 FCC 2d 54, Fourth Report and Order, 95 FCC 2d 554 (1983), Fifth Report and Order, 98 FCC 2d 1191 (1984), Sixth Report and Order, 57 Rad. Reg. 2d (P&F) 1391 (1985), *vacated*, MCI Telecommunciations Corp. v. FCC, No. 85-1030 (D.C. Cir. July 9, 1985).

[4] Digital Termination Systems, 86 FCC 2d 360 (1981), *modified*, 90 FCC 2d 319 (1982), *further modified*, 54 Rad. Reg. 2d (P&F) 1091 (1983), *petition for review dismissed sub nom.* Alascom, Inc. v. FCC, 727 F.2d 1212 (D.C. Cir. 1984).

[5] Instructional TV Fixed Service, 94 FCC 2d 1203 (1983), *reconsideration denied*, 49 Fed. Reg. 27,147 (July 2, 1984).

[6] *See* Digital Termination Sys., 54 Rad. Reg. 2d (P&F) 1091 (1983), *modified*, 49 Fed. Reg. 37,760 (1984).

[7] Requirements for Licensed Operations in Various Radio Servs., 49 Fed. Reg. 20,658 (May 16, 1984).

[8] MMDS Lottery Order, 50 Fed. Reg. 5983 (Feb. 1, 1985); Procedures for Processing Mutually Exclusive Applications for Digital Termination Systems, 50 Fed. Reg. 45608 (Nov. 1, 1985).

[9] *See, e.g.*, Specialized Common Carrier Servs., 29 FCC 2d 879 (1971), *aff'd sub nom.* Washington Utils. & Trans. Comm'n v. FCC, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1976).

MDS,[10] and DEMS, the primary services regulated under Part 21.[11] One of the benefits of competition is the stimulation of new and increased service to the public. New services are spawned from the innovation that competition encourages, while increased availability of traditional services occurs as firms seek to respond more rapidly to market needs.[12] The realization of these benefits, however, can be frustrated by delay in the authorization and construction of facilities. In addition to the cost incurred by applicants, there are social costs from such delay: radio spectrum lies fallow, which prevents its use by other applicants or, alternatively, its reallocation to different uses. When the delay is caused or encouraged by our rules or processing procedures, we have an affirmative duty to reevaluate those rules and procedures.

3. We propose, therefore, the following changes in Part 21 of the Rules: the elimination of construction permits (granting instead licenses with construction periods as license conditions); the elimination of the need to demonstrate financial qualifications; the adoption of strict requirements for extension of the time allowed for construction; the elimination of network classification distinctions from the rules governing DEMS; and the adoption of streamlined procedures for certain minor facilities changes. In addition, we are using this proceeding to propose certain "housecleaning" changes that would eliminate obsolete rules.

II. Proposed Rule Changes

A. Elimination of Construction Permits

4. The Communications Amendments Act of 1982 modified, *inter alia*, Section 319 of the Communications Act to provide that construction permits "shall not be required for . . . stations licensed to common carriers, unless the Commission determines that the public interest, convenience and necessity would be served by requiring such permits for any such stations."[13] We subsequently issued a public notice stating that construction permits would continue to be required until such time as we

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[10] Instructional TV Fixed Service, 94 FCC 2d at 1224-29.

[11] Digital Termination Sys., 86 FCC 2d at 368-69, 386-87.

[12] Specialized Common Carrier Services, 29 FCC 2d at 880-87, 904-20; *see* Shepherd, The Competitive Margin in Communications, in Technological Change in Regulated Industries 86, 87-92 (W. Capron, ed. 1971); *see generally* J. Meyer, The Economics of Competition in the Telecommunications Industry (1980); Kamien & Schwartz, Market Structure and Innovation: A Survey, 13 J. Econ. Lit. 1 (1975).

[13] 47 U.S.C. § 319(d), *as modified by* The Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, 1096 (1982).

thought it appropriate to initiate rulemaking procedures to implement the provisions of the 1982 amendments.[14]

5. The experience we have gained from one step licensing in other services persuades us that the public interest would be best served by adopting a one-step licensing scheme for the services regulated under Part 21. Currently, prospective microwave radio licensees go through a two-step procedure, first applying for a construction permit (using FCC Form 435) and then for a station license (using FCC Form 436). Under the proposed rules, an applicant wishing to offer a microwave fixed service under Part 21 would apply for a license using a revised application form combining much of the information now contained in FCC Forms 435 and 436. If granted, the license would be conditioned upon the licensee completing construction of the station facilities within a specified period. The license would also be conditioned upon the licensee filing a certification of completion of construction with the Commission when construction is completed.[15] The certification would serve as a means of informing the Commission and others that the microwave station is operational and has not been abandoned. The proposed license application and certification form is attached as Appendix C. We seek comments on the proposed form.

6. We are proposing this change for substantially the same reasons that we adopted a similar procedure in the mobile services area.[16] We now have more than two years experience with the process. Based on that experience we conclude that extension of the policy to the Part 21 domestic fixed radio services should result in time savings for the public and Commission's staff with no substantial public interest detriments to our licensing responsibilities.[17] This approach would avoid any delay associated with a

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[14] Effect of Communications Amendments Act of 1982 on Constr. Permits for Public Coast, Privately Owned Fixed Microwave and Common Carrier Stations, 52 Rad. Reg. 2d (P&F) 808 (1982).

[15] The expiration date of the construction period will be included in the authorization of the license grant. We are also proposing that the certification of construction be placed on public notice. *See* proposed Rule 21.27(a)(3). In this fashion, the public would generally know the status of a given license.

[16] *See* Public Mobile Radio Services, 95 FCC 2d 769 (1983), *reconsideration* FCC 85-367 (1985); *see also* Amendment of Part 74 of the Commission Rules and Regulations in Regard to the Instructional Television Fixed Service, 101 FCC 2d 50 (1985).

[17] It appears that it would take considerable resources to modify our current data processing systems to accommodate such a scheme. In addition, some retraining of Commission staff would be necessary. In order to make the most reasoned decision as to whether we should finally adopt a one-step licensing procedure, we request that commenters estimate the amount of time and resources they

second authorization step for the same facility. We continue to believe that applicants should be required to obtain an authorization prior to construction in order to assure efficient spectrum utilization, use of approved transmitting equipment and to minimize intereference and other problems that could be exacerbated if undiscovered until after construction were completed. The current system of pre-construction resolution of potential problems has worked well and should be retained. At the same time, our proposal is in accordance with the spirit of the Communications Act amendment cited above in that it should speed service to the public and lessen the time spent by carriers in obtaining a license.

7. If a licensee does not file a certification of construction completion within the construction period the license would expire automatically under our proposed rules, in a fashion similar to the forfeiture that occurs when a licensee fails to timely renew a license.[18] Under our proposal when the construction period has expired and no certification has been filed the license will be considered abandoned and applications will be accepted for use of the frequency. This approach, which has been used in the mobile services area, will conserve Commission resources, ease the filing burdens of those licensees who do in fact construct, and at the same time accelerate the recycling of scarce frequencies when facilities are not promptly constructed. Any request to modify the license by extending the construction period must be filed for each station on FCC Form 701. (Editorial changes may be necessary to Form 701). Such extensions will not be routinely granted. *See* paras. 13–18 *infra.*

8. Finally, we note that in the past the grant of a construction permit has included authorization under § 214 of the Act, 47 U.S.C. § 214, such that separate § 214 authority is not required for the facilities described in the original permit application.[19] Our proposed rules will not affect major change in this policy. Any § 214 authority previously conferred by grant of a construction permit would be conferred instead by the grant of a license with a construction period condition therein.

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might incur in changing to the new system. Congress has left the decision to us as to whether one-step licensing is in the public interest; clearly, the costs involved in adopting such procedures are critical to that analysis.

[18] *See* proposed Rule 21.44.

[19] *E.g.*, California Interstate Tel. Co. v. FCC, 328 F.2d 556 (D.C. Cir. 1964); Transamerican Microwave, Inc., 9 FCC 2d 159, 162 (1967); Intermountain Microwave, 24 FCC 54 (1958). Of course, many of the carriers offering service pursuant to Part 21 authority are subject to forbearance from § 214 regulation. *See* Competitive Carrier, *supra* note 3.

B. Financial Qualifications

9. Section 308(b) of the Act requires all applicants for station authorizations to "set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station . . . " 47 U.S.C. § 308(b). In the past, we have required applicants to provide us with information as to their financial qualifications, and we have made financial capability a condition of licensure. 47 C.F.R. § 21.17. However, we are not required to do so by the Act; it is within our discretion to decide whether financial fitness is relevant to our determination that the public interest, convenience and necessity requires grant or denial of an application.[20]

10. Regulatory scrutiny of the financial qualifications of applicants for common carrier domestic fixed radio licenses, while generally not contributing significantly to the public interest, can result in added delay and expense. We have eliminated or de-emphasized a prior demonstration of financial qualifications in a number of other services and it does not appear that such actions have adversely affected our accomplishments of the objectives of the Communications Act. We have eliminated such qualifications entirely for most common carrier mobile radio services,[21] and for low-power television applications.[22] For broadcast services generally we have allowed applicants initially to certify that they are financially qualified to construct and operate the proposed facilities,[23] and for direct broadcast satellites we have replaced stringent financial showings with a requirement that those authorized to proceed show diligence in constructing facilities.[24]

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[20] In Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630 (D.C Cir.), *cert. denied*, 425 U.S. 992 (1976), the court of appeals noted that because it is within the Commission's discretion to decline to seek financial information, "it follows necessarily that the Commission is not required to consider financial fitness if it deems it irrelevant to its regulatory scheme." *Id.*, at 645.

[21] Elimination of Financial Qualifications in the Pub. Mobile Radio Servs., 82 FCC 2d 152 (1980). Financial considerations remain relevant to cellular mobile applications. *See* Cellular Lottery Order, Further Reconsideration, Mimeo No. 36285 (Common Carrier Bureau, Dec. 3, 1985).

[22] Low Power Television and Television Translator Servs., 57 Rad. Reg. 2d (P&F) 234 (1984).

[23] Review of Application for Constr. Permit for Commercial Broadcast Stations (FCC Form 301), 50 Rad. Reg. 2d (P&F) 381 (1981).

[24] Direct Broadcast Satellites, 90 FCC 2d 676, 718–20 (1982). In the fixed satellite service, where the long construction periods could result in the passage of sev-

11. Scrutiny of an applicant's financial qualifications to construct facilities and offer services under Part 21 adds to our regulatory burden without corresponding benefits to the public. The relatively short construction period should act as an enforcement mechanism that will ensure that financially unqualified persons do not warehouse frequencies. For these reasons, we are proposing that existing Rule 21.17 be eliminated, and that all references to financial qualifications be deleted from Part 21.[25]

C. Construction of Facilities

12. While some of the delay in offering new services to the public is caused by the regulatory process, siginificant delay is often caused by applicants' failures to construct facilities promptly. Our present authorization process is based upon the assumption that each applicant in fact intends to and will construct facilities. Our experience in some of the Part 21 services, however, suggests that this may not always be the case.[26] Some applicants seek construction permits for the purpose of subsequently assiging or transferring them for profit, while other permittees delay construction of facilities in order to secure customers or acceptable financial terms, or until such time as they feel the economic climate best suits their enterprise. Currently, there is no substantial economic penalty for holding an authorization without constructing.

13. Warehousing authorizations is not in the public interest. The public is best served when new services are brought on line as rapidly as possible. A carrier who is warehousing its permits is

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eral years before a licensee proves to be financially unable to construct, launch and operate a satellite, we still require a demonstration of financial capability.

[25] Of course, if financial questions were relevant in a given case to a determination (basic or comparative) that an applicant was "otherwise qualified," we would seek the specific information needed. We are merely proposing that we eliminate a prior demonstration of financial qualifications as a routine license condition.

[26] Our experience has been particularly discouraging in two services, DEMS and single-channel MDS. For DEMS, our records indicate that of the number of DTS stations that reasonably could have been expected to have been constructed and operated by November of 1985, less than 10% actually have licenses on file. Our conclusion that this spectrum is being warehoused is bolstered by a review of the six-month reports required of DTS permittees by § 21.43(c). These reports show substantial delay in construction progress. Our experience has been somewhat similar for single-channel MDS. Applicants for MDS station permits are generally given 8 months to construct and test their facilities. 47 C.F.R. § 21.43(a). Our records show that when at least one request for an extension or modification is granted, the average construction time becomes almost 28 months, or an increase of 350%.

preventing all other uses of that spectrum, resulting in that spectrum lying fallow. The proposed rules would attempt to prevent these practices in a number of ways. First, since the construction time would be set as a license condition, any licensee who wishes to extend that time msut do so by modifying the underlying license. We are proposing to list applications for extension of time on public notice. The formality of this process and the ability of competing parties to object to the proposed extension should itself deter frivolous requests for delays.

14. Second, proposed Rule 21.40 contains specific requirements for modifying a license to extend construction time. These requirements, which have been extracted from prior Commission decisions, state that extension of construction time will be granted only in one of two instances: (1) when unforseeable circumstances prevent timely construction, or (2) when some other overriding public interest reason justifies an extension of construction time.[27] We are essentially codifying these conditions in proposed Rule 21.40. However, we take this opportunity to set out a few examples of what would *not* constitute a valid justifications for additional construction time. As noted above, by eliminating financial qualifications we are respecting the independent business judgment of applicants that they are financially qualified. Therefore, an independent business judgment to delay construction for financial reasons would not be an unforseeable circumstance justifying an extension of construction time.[28] Delays will not be condoned if based upon the state of the economy[29] or on escalating costs,[30] upon difficulty in finding a customer,[31] or upon a licensee's decision to ignore some facilities while constructing

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[27] Northeast TV Cablevision Corp., 21 FCC 2d 442, 443-44 (1970); Radio Longview, Inc., 19 FCC 2d 966 (1969); Bernard Rappaport, 18 FCC 2d 1022 (1969); Beacon Radio, Inc., 18 FCC 2d 648 (1969); Nelson Broadcasting Co., 18 FCC 2d 609 (1969); Assignment and Transfer of Construction Permits for New Broadcast Stations, 16 FCC 2d 789 (1969).

[28] Independent business judgments are within the applicant's control, and thus have not been treated in the past as a basis for extending construction time. Joe L. Smith, Jr., Inc., 5 Rad. Reg. 2d (P&F) 582 (1965); *accord* Radio Longview, Inc., 19 FCC 2d at 968-71; Beta Television Corp., 27 FCC 2d 761, 763 (Rev. Bd. 1970).

[29] *E.g.*, Rock City Broadcasting, Inc., 52 FCC 2d 1246 (Rev. Bd. 1975) (energy crisis); Hymen Lake (WHHL), 56 FCC 2d 379 (Rev. Bd. 1975) (regional economic depression); Comet Television Corp., 46 FCC 2d 1107 (Rev. Bd. 1974) (general depressed state of economy).

[30] *E.g.*, UHF Broadcasting Co., 53 FCC 2d 660 (Rev. Bd. 1975); Comet Television Corp., 46 FCC 2d 1107 (1974).

[31] *Cf.* Tex-Ark TV Co. (KTXK-TV), 38 FCC 2d 650 (Rev. Bd. 1972) *see also* Northeast TV Cablevision Corp., 21 FCC 2d 442, 448 (1970) *reconsideration denied sub nom.* Jackson Television Corp., 23 FCC 2d 321 (1970).

others.[32] In addition, requests for additional time for the purpose of changing the nature of the service[33] or for undertaking additional market studies on the economic feasibility of the proposed project[34] will not be accpeted, nor will delay caused by the uncertainty of the status of competitors[35] or a desire to avoid competition.[36] In addition, extensions will not be granted for the mere purpose of finding an assignee for the license.[37] As we have previously stated, "the extension of a construction permit for the sole purpose of keeping it alive while protracted negotiations are conducted with prospective assignees or transferees is contrary to our responsibilities under the Act."[38]

15. Along these lines, we note that we have traditionally accepted applications when the applicant has merely demonstrated reasonable assurance that the site was available. We intend to continue this policy. However because this has resulted in the filing of numerous petitions for extensions of time to construct when a site has become unavailable, we propose to not issue licenses until the applicant submits a executed lease or option, demonstrates that it owns the site, or otherwise demonstrates that it will be able to use the site.

16. This approach to requests for extension of time is consistent with our relaxation of financial qualifications, and our approach in other services. In the *Direct Broadcast Satellite* proceeding, we concluded that "[i]n lieu of stringent financial showings and subsequent Commission analysis, we will require that parties granted authorizations proceed with diligence in constructing interim DBS systems."[39] In the low power television service, we justified our elimination of financial qualifications in part upon our reliance on a strict one-year construction period.[40]

17. We are therefore giving notice of our intention to discourage routine requests for additional construction time. Those who seek such a license modification will be required under proposed

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[32] *E.g.*, Northeast TV Cablevision Corp., 21 FCC 2d at 447.

[33] *E.g.*, UHF Broadcasting Co., 53 FCC 2d 660 (Rev. Bd. 1975).

[34] *See e.g.*, Radio Longview, Inc., 19 FCC 2d at 966, 969 (1969).

[35] *E.g.*, Community Telecasters of Cleveland, Inc., 58 FCC 2d 1296 (Rev. Bd. 1976); Radio Longview, Inc., 19 FCC 2d at 968. *But see* Channel 16 of Rhode Island, Inc. v. FCC, 440 F.2d 266 (D.C. Cir. 1971).

[36] *E.g.*, Community Telecasters of Cleveland, Inc., 58 FCC 2d at 1300; UHF Broadcasting Co., 53 FCC 2d at 665; *see* Radio Longview, Inc., 19 FCC 2d at 971.

[37] *See* Jackson Television Corp., 23 FCC 2d 321 (1970).

[38] Telemusic Co., 4 FCC 2d 221, 223 (1966).

[39] Direct Broadcast Satellites, 90 FCC 2d at 719.

[40] Low Power Television and Television Translator Serv., 57 Rad. Reg. 2d (P&F) 234 (1984).

Rule 21.41 to set forth in detail the precise reasons for the request, and to justify a precise period for extension. All such requests will be considered on a case by case basis. The construction periods for the various services are set forth in proposed Rule 21.43.[41] These are set at what we consider to be the *maximum* periods within which construction ought to be completed under normal circumstances. We have attempted to give licensees sufficient time to construct in order to reduce the number of requests for modification of the construction time. We will require that a station be placed into operation within the construction period specified in the license. Modifications to the facility, whether minor or major in nature, must be completed within the initial construction period.

18. As noted above, a speculator who warehouses an authorization for the period required to find a profitable transferee or assignee incurs no significant economic cost for any such delay. We are proposing, therefore, to internalize the cost of such delay by the provisions of proposed Rule 21.40(c), which state that once a license is transferred or assigned no extension of the construction time will be granted.[42] The economic value of such license for purposes of transfer will decrease as the construction deadline approaches; a potential transferee or assignee will know in advance that the construction period for such licenses will be fixed, and their value thus more easily determined. This approach would benefit the public interest by lessening one cause of construction delay; in light of the fact that we are streamlining our application process, any harm from such a proposal should be minimal.[43]

19. The changes outlined above should result in more rigorous planning by applicants. A subsidiary benefit we foresee from more rigorous planning is a decline in the abuse of the special temporary authority (STA) procedures outlined in Section 21.25.

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[41] Because we do not intend to grant extensions of time except under unusual circumstances and because experience in MDS shows that permittees have had particular problems in meeting an eight month construction timetable, we are proposing to extend the period of construction for MDS to 12 months. *See* Section 21.43.

[42] We have in the past adopted rules that provide that no extensions of construction time will be granted after the permittee takes certain actions. *E.g.*, 47 C.F.R. § 90.366(d) (no extension of construction time after changing election of construction schedule for trunked systems loading requirements).

[43] There is always the possibility that assignees or transferees may be prevented from finalizing a good faith construction effort by events beyond their control. Nevertheless, those parties have the option of filing a new application, a burden which would be less onerous in light of our attempts to eliminate unnecessary delay in the application process.

We are not here proposing any significant changes to that rule because we believe the rule, as written, satisfies the public interest. However, too many carriers appear to be using the STA process as their normal means of commencing service. These carriers often come to the Commission with little or no justification for the STA request other than a claim that a customer wants service immediately. Acting on STA requests — whether granting or denying — imposes an additional processing burden on the staff that leaves less time to process the underlying application. The average point-to-point construction permit can be obtained in a relatively short time — approximately 45 days — and under our proposed one-step licensing scheme many licenses ought to be granted in the same amount of time. This is a short enough period that in the normal course of business a carrier ought to be able to fit that period into its planning cycle with little or no problem. In order to protect other carriers from interference and to preserve the efficacy of the coordination process, applications should go on public notice whenever possible. Therefore we hereby give notice that we intend to scrutinize more closely future STA requests and deny them except under the extraordinary circumstances contemplated in the rules.

D. Frequency Coordination

20. The frequency usage coordination procedures described in Section 21.100(d) are used by two services governed under Part 21 — Point-to-Point Microwave and Local Television Transmission — as well as by services governed under four different rule parts: Domestic Satellites,[44] Television Broadcast Auxiliary,[45] Cable Television Relay,[46] and Private Operational Fixed Microwave.[47] Because of the number of services sharing frequency bands and using the coordination procedures described in Section 21.100(d), we are proposing several changes to clarify the rule. These changes are designed to make it easier for services that are governed under different rule parts providing different application processing procedures to use the same frequency coordination procedures, to provide a compatibility among the different services as to when coordination is required, and to clarify the

[44] *See* 47 C.F.R. § 25.203.
[45] *See* 47 C.F.R. § 74.638.
[46] *See* 47 C.F.R. § 78.36.
[47] *See* 47 C.F.R. § 94.63.

coordinating carriers responsibility to other carriers.

21. First, we propose to delete from Section 21.100(d) reference to specific services using the coordination procedures. The subparts governing Point-to-Point and Local Television Transmission will be amended by adding new rule subsections which prescribe that applications in those services are required to show frequency usage coordination under Section 21.100(d).[48] Also, we propose to restructure Section 21.100(d) into two subsections: general requirements and coordination procedure guidelines. Second, we propose to clarify that coordination is to be completed for new applications for regular authorization in a service as well as for those amendments or modifications which are either: (1) defined as "major" by the rules governing the service, or (2) are changes that one would reasonably expect to cause harmful electrical interference greater than the levels specified for the service(s) involved.

22. Finally, we propose to clarify subparagraph (d)(2) relating to the procedures to be followed when technical changes for a system are made during the course of coordination or made after coordination is successfully completed and to clarify a licensee's responsibility to notify other licensees of its intentions regarding facilities for which coordination has been completed but for which no application has been filed 6 months after completing coordination.

E. DEMS

23. DEMS provides end-to-end, two-way transmission of digitally encoded information. A DEMS network consists of two or more digital termination systems (DTS) that may be interconnected by terrestrial microwave or satellite. Under the current rules there are two types of DEMS networds. An extended network consists of DTS facilities in 30 or more SMSAs; a limited network consists of DTS facilities in fewer than 30 SMSAs. An applicant's status as either an extended or limited carrier determines eligibility for channel assignments in the 10 GHz band, maximum station construction and network completion periods, and eligibility for additional channel assignments in an SMSA.

24. The rules regulating DEMS reflect the underlying network concept of the service as it was originally conceived. In the rulemaking proceeding that allocated spectrum for DEMS, the general consensus of the commenters was that the facilities would

[48] *See* proposed Rules 21.706(c), 21.807(a)(6).

be used primarily as part of national or regional networks. Experience with DEMS development, however, suggest that the regulatory scheme should be modified. First, DEMS is not being developed as a network service by all carriers. Some carriers are treating each DTS as a discrete unit providing primarily a local distribution function; others have resold service on some of their stations to other telecommunications carriers; and some telephone companies intend to use DTS as an "interchangeable" component in their digital data service. Second, determining channel assignment eligibility by an applicant's network status has produced inequitable results and hampers DEMS development overall. Carriers assigned to limited network channels in the 10 GHz band have difficulty in servicing customers with large capacity needs or in offering a mix of voice and data services. Third, DEMS development and growth has been hampered by the lengthy time periods allowed for station construction and network completion. When carriers do not construct authorized facilities in a timely and expeditious fashion, other carriers are delayed entry into the market.

25. We are proposing that network distinctions be eliminated from the DEMS rules. The major proposed rule changes that would accomplish this are as follows:

(1) To make all DEMS applicants eligible for any channel assignment;[49]

(2) To maintain the channel bandwidth allocations in the 10 GHz band[50] but to allow applicants and licensees in the 10 GHz band to apply for up to 5 MHz of spectrum in that bandwidth without requiring a second channel showing;[51]

(3) Except as provided by (2) above, to restrict additional channel assignments to licensees who have operated a previously authorized DTS for at

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[49] *See* Proposed Rule 21.500.

[50] When DEMS was established, the Commission intended to preserve 5 MHz wide channel assignments for extended network applicants only for 5 years. *See* Digital Termination Systems, 86 FCC 2d 360, 374–75 (1981). After April 16, 1986 all frequency was to be rechannelized to 2.5 MHz wide channels and made available to any applicant. 47 C.F.R. § 21.502(f). We are now proposing that 5 MHz wide channel assignments, as described in Sections 21.502(b) and (e)(1), be retained. We will maintain the existing channel assignments until conclusion of this rulemaking in order to ensure the availability of a sufficient number of wide band channels.

[51] *See* proposed Rule 21.502(b). Although this change could reduce the number of potential carriers in a market by three (resulting in 15 potential carriers), we believe that this slight reduction would not hamper the development of a competitive DEMS market. Furthermore, by allowing all carriers in the 10 GHz band equal bandwidth, the proposed change would enable the remaining carriers to offer competitive services on an equal footing.

least one year and who demonstrate need;[52] and

(4) To allow a maximum construction time of 18 months for each DTS authorization granted.[53]

26. We also propose eliminating requirements concerning the filing of network construction schedules and six-month progress reports[54] as well as the need to be granted a DEMS network authorization as a prerequisite to granting individual DTS authorizations.[55]

27. Applicants would continue to make individual application for DTS facilities. Applicants intending to interconnect DTS facilities as a network could file as a group those applications for the network segment that it intends to construct within a given 18 month period. Subsequent group filings for additional network segments could be made as the carrier's need and resources permit.

F. Docket 20490 Revisions

28. We are proposing several changes that should streamline the application process and lessen the financial burden on applicants and licensees. In proposed Rule 21.33 we are recommending that applications for certain minor facilities modifications be granted automatically on the twenty-first day after filing, unless the applicant otherwise is notified by the Commission. In addition, in proposed Rule 21.42 we are recommending that certain minor modifications be permitted without any prior authorization. Similar revisions were previously proposed in CC

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[52] *See* proposed Rule 21.502(c). There would be no limit on the number of channels a carrier could apply for in an SMSA; however, licensees could only apply for one additional channel at a time and at periodic intervals.

[53] *See* proposed Rule 21.43(a). Our experience with DEMS indicates that primarily two types of networks are being constructed: "national" networks initially consisting of 10–15 major markets and small, regional networks. Some DTS facilities are not connected to comprise a network. This overall level of development does not justify the current construction periods of 30 and 60 months. A shorter construction period will not only encourage carriers to apply only for channels in those SMSAs where they are ready to construct facilities but, also, will make channels available for reassignment more rapidly. Furthermore, a shorter construction period for DEMS is desirable in light of our proposal to eliminate the financial qualifications requirement (*see* paras. 9–11). The proposed 18 month construction period appears reasonable given the current nature of DEMS development and would apply to any application filed after the release of this Notice.

[54] 47 C.F.R. § 21.43(c). These requirements were mandated by the grant of numerous construction permits to each applicant and the lengthy construction periods assigned to each. *See* Digital Termination Systems, 86 FCC 2d 360, 385 (1981).

[55] *See* Competitive Carrier, Fifth Report and Order, 98 FCC 2d 1191, 1208–09 (1984).

Docket No. 20490.[56] Because we have subsequently introduced both DEMS and multichannel MDS, we are resubmitting these proposals for comment. We are also resubmitting those recommendations from CC Docket No. 20490 which would require the prompt submission of a license for cancellation if the station does not render service for six months.[57]

G. Miscellaneous Rule Revisions

29. We are proposing that several of the technical operation requirements in Subpart D of Part 21 be eliminated because they are either unnecessary or redundant. These include required references,[58] required maintenance,[59] transmitter measurement,[60] station records,[61] and station identification procedures.[62] We are also recommending the elimination of the business record requirement of Rule 21.300 and a liberalizing of Section 21.201(a) to provide that the name and address of the custodian of the station license be posted at the station or control point in lieu of the original of the license being posted at the station.

30. With regard to license applications, we are proposing to eliminate the requirement that applicants submit topographic maps,[63] and are suggesting that self-certification of compliance with FAA standards replace the present procedure.[64] We also propose to clarify the provisions of Rules 21.20 and 21.26 with regard to the filing of applications.

31. We also are proposing deletion of the requirement in Section 21.15(f) that, when maintenance of a radio station is to be accomplished by contractual arrangement with an entity unrelated to an applicant, a copy of the agreement or contract is to be filed with the application. Applicants would, however, still be required to provide the basic information on general maintenance procedure set forth in Section 21.15(e). We also are proposing to revise Section 21.13(g) concerning day-to-day management and operation of facilities to cover situations when these function are accomplished by a contractual arrangement with an entity unrelated to the applicant or licensee. Carriers often use independent contrac-

[56] *See* 55 FCC 2d 36, 45–47 (1975) (Notice of Proposed Rulemaking, CC Docket No. 20490).
[57] Proposed Rule 21.303(d).
[58] Rule 21.204.
[59] Rule 21.206.
[60] Rule 21.207.
[61] Rule 21.208.
[62] Rule 21.213.
[63] Rule 21.15(h).
[64] Proposed Rule 21.15(d).

tors to manage and operate their stations. We expect the licensee to maintain effective control of its facilities and to assume responsibility for the agent's compliance with Commission rules. Since the applicant's responsibility in this regard is ongoing, we will require that licensees as well as applicants notify us of such agency arrangements and demonstrate their continued control of the station.

32. With regard to our cut-off procedure for mutually exclusive applications, we are proposing that the provisions of Rule 21.31(e)(2) be amended. That paragraph was originally intended to exempt from the cut-off rules any major amendment that created no new frequency conflicts and that resolved existing frequency conflicts *which would otherwise require a hearing* (or lottery).[65] In that this was the purpose of the rule, we are amending it to reflect that sentiment directly.

33. In MDS, we are proposing to clarify our rules so as to specifically require applicants to include information on antenna orientation, where applicable.[66] While most applicants have included this information in their applications, and the information is clearly necessary to fully describe the system, there has been some confusion as to whether this information is required by the rules.

34. Finally, we propose to eliminate several rule parts which were inadvertently retained when public mobile radio service regulations were removed to Part 22,[67] rewording several definitions to parallel the definitions used in Part 22[68] eliminating or clarifying several miscellaneous conditions,[69] and rewriting several others to eliminate gender-specific pronouns.[70]

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[65] *See* Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to Domestic Pub. Radio Servs. (other that Maritime Mobile), 60 FCC 2d 549, 560 (1976).

[66] Proposed Rule 21.906(a); *see also* proposed Rule 21.20(b)(7) (failure to provide antenna orientation, where relevant, renders application defective).

[67] See Rules 21.13(f)(2), 21.102, 21.103, 21.104, 21.107(c), 21.110(a). Also, we are eliminating the following definitions that are only relevant to Part 22 of the rules: auxilliary test station, control point, interoffice station, mobile microwave, auxilliary station, and repeater station.

[68] See proposed changes to Rule 21.2.

[69] *See* Rules 21.1, 21.3, 21.118(a), 21.303, 21.304 and 21.305. We are also proposing to delete Section 21.20(a)(7) referencing applications for which U.S Forest Service or Bureau of Land Management site availability certification is required.

[70] *E.g.*, Rules 21.21, 21.22, 21.30 and 21.405.

III. Administrative Matters

35. Pursuant to the procedures set out in § 1.415 of the Commission's rules, 47 C.F.R. § 1.415, interested parties may file comments on these proposals on or before May 19, 1986 and reply comments on or before June 2, 1986. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

36. In accordance with the provisions of § 1.419 of the rules, 47 C.F.R. § 1.419, formal participants shall file an original and five copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 9 copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. Comments and reply comments should be sent to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. All documents will be available for public inspection during regular business hours at the Commission's Public Reference Room at its headquarters, Room 239, 1919 M Street, N.W., Washington, D.C. For general information on how to file comments, please contact the FCC Consumer Assistance and Information Division at (202) 632-7000.

37. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any

previously-filed written comments for the proceeding must prepare a written summary of that presentation on the day of oral presentation. That written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* 47 C.F.R. § 1.1231.

38. As required by Section 603 of the Regulatory Flexibility Act, we have prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. Any such comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis.

39. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to decrease the information collection burden which the Commission imposes on the public. This proposed reduction in information collection is subject to approval by the Office of Management and Budget as prescribed by the Act.

IV. Conclusion

40. Accordingly, pursuant to the authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 4(i), 303, and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, we hereby give notice of our intent to adopt the rule revisions set forth in Appendix B.

41. The Secretary shall cause a copy of this Notice, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 603(a) (1981).

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

I. Reason for Action

In this proceeding the Commission seeks to develop a record and to elicit comments on proposed rules. The proposed rules are part of the Commission's ongoing review and reevaluation of its rules and policies.

II. Objective

The proceeding will elicit comments on the public interest benefits and costs of the proposed rule changes, in accordance with the Commission's obligations under the mandate of Sections 301-19 of the Communications Act of 1934, 47 U.S.C. §§ 301-19.

III. Legal Basis

The legal basis for eliciting comments on these proposals to change our rules is found in Sections 4 and 303 of the Communications Act, 47 U.S.C. §§ 154, 303.

IV. Description, Potential Impact, and Number of Small Facilities Affected

The proposed rules would apply to all entities, including small entities, who seek authorization under Part 21 of the Commission's rules to construct and operate common carrier domestic fixed radio facilities. The proposed rules would update and simplify the radio license application procedure and relieve applicants and licensees of various requirements.

V. Recording, Record Keeping and Other Compliance Requirements

The proposed rules will create no additional impact.

VI. Federal Rules Which Overlap, Duplicate or Conflict with the Proposed Rules

There is no overlap, duplication or conflict.

VII. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives

There is no significant alternative.

APPENDIX B

The Table of Contents for Part 21 is amended to read in its entirety as follows:

PART 21 - DOMESTIC PUBLIC FIXED RADIO SERVICES

Subpart A - General

Sec.
21.1 Scope and authority.
21.2 Definitions

Subpart B - Applications and Licenses

GENERAL FILING REQUIREMENTS

21.3 Station authorization required.
21.4 Eligibility for station license.
21.5 Formal and informal applications.

21.6 Filing of applications, fees, and number of copies.
21.7 Station application forms for domestic public fixed radio service licenses.
21.8 - 21.10 [Reserved]
21.11 Miscellaneous forms shared by all domestic public radio services.
21.12 [Reserved]
21.13 General application requirements.
21.14 [Reserved]
21.15 Technical content of applications.
21.16 - 21.19 [Reserved]
21.20 Defective applications.
21.21 Inconsistent or conflicting applications.
21.22 Repetitious applications.
21.23 Amendment of applications.
21.24 [Reserved]
21.25 Application for temporary authorization.

PROCESSING OF APPLICATIONS

21.26 Receipt of application.
21.27 Public notice period.
21.28 Dismissal and return of applications.
21.29 Ownership changes and agreements to amend or to dismiss applications or pleadings.
21.30 Opposition to applications.
21.31 Mutually exclusive applications.
21.32 Consideration of applications.
21.33 Grants by random selection.
21.34 [Reserved]
21.35 Comparative evaluation of mutually exclusive applications.
21.36 - 21.38 [Reserved]

LICENSE TRANSFERS, MODIFICATIONS, CONDITIONS AND FORFEITURES

21.39 Assignment or transfer of station authorizations.
21.40 Modification of station license.
21.41 Special processing of applications for minor facility modifications.
21.42 Certain modifications not requiring prior authorization.
21.43 Period of construction; verification of completion of construction.
21.44 Forfeiture and termination of station authorization.
21.45 License period.

Subpart C - Technical Standards

21.100 Frequencies.
21.101 Frequency tolerance.
21.102 - 21.104 [Reserved]
21.105 Bandwidth.
21.106 Emission limitations.
21.107 Transmitter power.
21.108 Directional antennas.
21.109 Antenna and antenna structures.

21.110 Antenna polarization.
21.111 Simultaneous use of common antenna structure.
21.112 Marking of antenna structures.
21.113 Quiet zones.
21.114 Temporary fixed antenna height restrictions.
21.115 [Reserved]
21.116 Topographical data.
21.117 Transmitter location.
21.118 Transmitter construction and installation.
21.119 Limitations on use of transmitter for other services.
21.120 Type acceptance of transmitters.
21.121 [Reserved]
21.122 Microwave digital modulation.

Subpart D - Technical Operation

21.200 Station inspection.
21.201 Posting of station authorization information.
21.202 - 21.208 [Reserved]
21.209 Communications concerning safety of life and property.
21.210 Operation during emergency.
21.211 Suspension of transmission.
21.212 - 21.213 [Reserved]
21.214 Operation of stations at temporary fixed locations for communication between the United States and Canada or Mexico.

Subpart E - Miscellaneous

21.300 [Reserved]
21.301 National defense; free service.
21.302 Answers to notices of violation.
21.303 Discontinuance, reduction or impairment of service.
21.304 Tariffs, reports, and other material required to be submitted to the Commission.
21.305 Reports required concerning amendments to charters and partnership agreements.
21.306 Requirements that licensees respond to official communications.
21.307 Equal employment opportunities.

Subpart F - Developmental Authorizations

21.400 Eligibility.
21.401 Scope of service.
21.402 Adherence to program of research and development.
21.403 Special procedure for the development of a new service or for the use of frequencies not in accordance with the provisions of the rules in this part.
21.404 Terms of grant; general limitations.
21.405 Supplementary showing required.
21.406 Developmental report required.

Subpart G - Digital Electronic Message Service

21.500 Eligibility.
21.501 Digital termination nodal stations may be authorized only as part of a digital termination system.
21.502 Frequencies.
21.503 Frequency stability.
21.504 Frequency interference.
21.505 Purpose and permissible service.
21.506 Transmitted power.
21.507 Radiated power limitation in the 10,600 - 10,680 MHz band.
21.508 Emissions and bandwidth.
21.509 Antennas.
21.510 Interconnection.
21.511 Spectrum utilization.
21.512 Limitation on number of nodal stations.

Subpart H - [Reserved]

Subpart I - Point-to-Point Microwave Radio Service

21.700 Eligibility.
21.701 Frequencies.
21.702 Transmitter power.
21.703 Bandwidth and emission limitations.
21.704 Modulation requirements.
21.705 Permissible communications.
21.706 Supplementary showing required with applications.
21.707 Stations at temporary fixed locations.
21.708 Notification of station operation at temporary fixed locations.
21.709 Renewal of station licenses.
21.710 Limitations on path lengths and channel loading.
21.711 Special requirements for operation in the band 38.600 MHz-40.000 MHz.
21.712 [Reserved]
21.713 [Reserved]

Subpart J - Local Television Transmission Service

21.800 Eligibility.
21.801 Frequencies.
21.802 Assignment of frequencies to mobile stations.
21.803 Transmitter power.
21.804 Bandwidth and emission limitations.
21.805 Modulation requirements.
21.806 Remote control operation of mobile television pickup stations.
21.807 Stations at temporary fixed locations.
21.808 Notification of station operation at temporary fixed locations.
21.809 Stations affected by coordination contour procedures.

Subpart K - Multipoint Distribution Service

21.900 Eligibility.
21.901 Frequencies.
21.902 Frequency interference.

21.903 Purpose and permissible service.
21.904 Transmitter power.
21.905 Emissions and bandwidth.
21.906 Antennas.
21.907 Transmission standards.
21.908 Television transmitting equipment.
21.909 MDS response stations.
21.910 Grants by random selection.

2. The authority citation for Part 21 is modified to read as follows:

AUTHORITY: Sections 21.40 to 21.910 issued under Sections 4 and 303, 48 Stat. 1066, 1082, as amended, 47 U.S.C. §§ 154, 303.

3. Sections 21.0 and 21.1 are deleted, and new Section 21.1 is added to read, in its entirety, as follows:

§ 21.1 Scope and authority.

(a) The purpose of the rules and regulations in this part is to prescribe the manner in which portions of the radio spectrum may be made available for domestic communication common carrier and other operations which require transmitting facilities on land or in specified offshore coastal areas within the continental shelf.

(b) The rules in this part are issued pursuant to the authority contained in Titles I through III of the Communications Act of 1934, as amended, which vest authority in the Federal Communications Commission to regulate common carriers of interstate and foreign communications, to regulate radio transmissions and issue licenses for radio stations, and to regulate all interstate and foreign communications by wire or radio necessary to the accomplishment of the purposes of the Act.

(c) Unless otherwise specified, the section numbers referenced in this part are contained in Chapter I, Title 47 of the Code of Federal Regulations.

4. Section 21.2 is amended by deleting the definitions of "auxiliary test station," "control point," "interoffice station," "mobile microwave auxiliary station," and "repeater station," by adding the words "to interconnect Digital Termination Systems to comprise a network" to the end of the definition of Digital Electronic Message Service, and by modifying the following defintions to read, in their proper order:

* * * * *

Antenna structures. The antenna, its supporting structure and anything attached to it.

* * * * *

Authorized power. The maximum power a station is permitted to use. This power is specified in the station's authorization.

* * * * *

Carrier frequency. The output of a transmitter when the modulating wave is made zero.

* * * * *

Fixed station. A station at a fixed location.

Frequency tolerance. The maximum permissible variation of the carrier frequency expressed as a percentage or in Hertz.

* * * * *

Mobile station. A radio-communication station capable of being moved and which ordinarily does move.

Necessary bandwidth of emission. For a given class of emission, the width of the frequency band that is just sufficient to ensure the transmission of information at the rate and with the quality required under specified conditions.

5. Section 21.3 is amended to read in its entirety as follows:

§ 21.3 Station authorization required.

(a) No person shall use or operate apparatus for the transmission of energy or communications or signals by radio except under, and in accordance with, an appropriate authorization granted by the Federal Communications Commission. Authorizations for domestic public fixed radio services are governed by the provision of this Part.

(b) A separate application form must be filed for each Digital Termination System nodal station. No license is required for a Digital Termination User station. Authority for a Digital Termination Nodal Station licensee to serve a specific number of user stations to be licensed in the name of the carrier shall be requested on FCC Form X filed for the Digital Termination Nodal station.

6. Paragraphs (a) and (b) of Section 21.5 are amended to read as follows:

§ 21.5 Formal and informal applications.

(a) Except for an authorization under any of the proviso clauses of Section 308(a) of the Communications Act of 1934 [47 U.S.C. § 308(a)], the Commission shall grant the following authorizations only upon written application: station licenses; modifications of station licenses; renewals of station licenses; extensions of time to construct, transfers and assignments of station licenses, or of any rights thereunder.

(b) Except as may be otherwise permitted by this Part, a separate written application shall be filed for each instrument of authorization requested. Applications may be:

(1) "Formal applications" where the Commmission has prescribed in this Part a standard form; or

(2) "Informal applications" (normally in letter form) where the Commission has not prescribed a standard form.

(c) * * *

7. Section 21.6 is amended by deleting the reference to Section 21.10 in paragraph (a) and by deleting the words "for filing" in paragraph (b).

8. Section 21.7 is amended to read in its entirety as follows:

§ 21.7 Standard application form for domestic public fixed radio service licenses.

FCC Form X shall be submitted and shall be granted for each station involved prior to commencement of any proposed station construction or amendment of such application, or modification of license pursuant to Sections 21.40(a) and 21.41. FCC Form X shall also be submitted to license permissible changes pursuant to § 21.42 and to delete licensed facilities.

9. Section 21.11 is amended to read in its entirety as follows:

§ 21.11 Miscellaneous forms shared by all Domestic Public Radio Services.

(a) *Licensee Qualifications.* FCC Form 430 ("Common Carrier Radio Licensee Qualification Report") shall be filed annually, no later than March 31 for the end of the preceding calendar year by licensees for each radio service, if public service was offered at any time during the preceding year. Each annual filing shall include all changes of information required by FCC Form 430 that occurred during the preceding year. In those cases where there has been no change in any of the required information the carrier, in lieu of submitting a new form, may so notify the Commissioon by letter.

(b) *Additional Time to Construct* - FCC Form 701 ("Application for Additional Time to Construct Radio Station") shall be filed in duplicate by a licensee prior to the expiration of the time for construction noted in a license if a licensee seeks to modify the license by extending the period of construction.

(c) *Renewal of Station License.* Except for renewal of special temporary authorizations, FCC Form 405 ("Application for Renewal of Station License") must be filed in duplicate by the licensee between thirty and sixty days prior to the expiration date of the license sought to be renewed. Whenever a group of station licenses in the same radio service are to be renewed simultaneously, a single "blanket" application may be filed to cover the entire group, if the application identifies each station by call sign and station location and if two copies are provided for each station affected. Applicants should note any special renewal requirements under the rules for each radio service.

(d) *Assignment of License.* FCC Form 702 ("Application for Consent to Assignment of Radio Station Construction Permit or License for Stations in Services Other than Broacasting"), shall be submitted to assign voluntarily (as by, for example, contract or other agreement) or involuntarily (as by, for example, death, bankruptcy, or legal disability) the station authorization. In the case of involuntary assignment (or transfer of control) the applications should be filed within 10 days of the event causing the assignment (or transfer of control). FCC Form 702 shall also be used for non-substantial (*pro forma*) assignments. In addition, FCC Form 430 shall be submitted by the proposed assignee unless such assignee has a current and substantially accurate report on file with the Commission. Whenever a group of station licenses in the same radio services are to be assigned to a single assignee, a single "blanket" application may be filed to cover the entire group, if the application identifies each station by call sign and station location and if two copies are provided for each station affected. The assignment shall be completed within 45 days from the date of authorization. Upon consummation of an approved assignment, the Commission shall be notified by letter of the date of consummation.

(e) *Partial Assignment of License.* In the microwave services, authorization for assignment from one company to another of only a part or portions of the facilities (transmitters) authorized under an existing license (as distinguished from an assignment of the facilities in their entirety), may be granted upon an application: (i) by the assignee on FCC Form X and (ii) by the assignor on FCC Form X for deletion of the assigned facilities, indicating concurrence in the request. The assignment shall be consummated within 45 days from the date of authorization. In the event that consummation does not occur, FCC Form X

shall be filed to return the assignor's license to its original condition.

(f) *Transfer of Control of Corporation Holding a License.* FCC Form 704 ("Application for Consent to Transfer of Control of Corporation Holding Common Carrier Radio Station License") shall be submitted in order to voluntarily or involuntarily transfer control (*de jure* or *de facto*) of a corporation holding any licenses. FCC Form 704 shall also be used for non-substantial (*pro forma*) transfers of control. In addition, FCC Form 430 shall be submitted by the proposed transferee unless said transferee has a current and substantially accurate report on file with the Commission. The transfer shall be completed within 45 days from the date of authorization. Upon consummation of an approved transfer, the Commission shall be notified by letter of the date thereof.

10. Section 21.13 is amended by replacing the reference to § 21.17 with § 21.15 in paragraph (c), by deleting the reference to § 21.103 in subparagraph (a)(6), by deleting subparagraph (f)(2), by redesignating (f)(1) as (f), and by amending paragraph (a), subparagraph (a)(2), and paragraph (g) to read as follows:

§ 21.13 General application requirements.

(a) Each application for a license or for consent to assignment or transfer of control shall:

(1) * * *

(2) Demonstrate the applicant's legal, technical, and other qualifications to be a licensee;

* * * * *

(g) Whenever an individual applicant, or a partner (in the case of a partnership) or a full time manager (in the case of a corporation) will not actively participate in the day-to-day management and operation of proposed facilities, the applicant or licensee will submit a statement containing the reasons therefor and disclosing the details of the proposed operation, including a demonstration of how control over the radio facilities will be retained by the applicant. If the operation of a radio station is to be accomplished by contractual arrangement with an entity unrelated to an applicant or licensee, the application shall contain a copy of the agreement or contract which shall demonstrate that:

(1) The operation is accomplished according to general instructions provided for by the applicant;

(2) The applicant retains effective control over the radio facilities and their operations; and

(3) The applicant assumes full responsibility for both the quality of service and for contractor compliance with the Commission's Rules.

11. Section 21.15 is amended by eliminating paragraphs (f), (h), and (i), by redesignating paragraph (g) as paragraph (f), by adding new paragraph (g), and by amending the first paragraph and paragraphs (a), (c), (d), and subparagraph (e)(2) to read as folows:

§ 21.15 Technical content of applications.

Applications shall contain all technical information required by the application form and any additional information necessary to fully describe the proposed facilities and to demonstrate compliance with all technical requirements of the rules governing the radio service involved (see subparts C, F, G, I, J and K as

appropriate). The following paragraphs describe a number of technical requirements.

(a) Applicants proposing a new station location (including receive-only stations and passive repeaters) shall indicate whether the station site is owned. If it is not owned, its availability for the proposed radio station site shall be demonstrated. Under ordinary circumstances this requirement will be considered satisfied if the site is under lease or under written option to buy or lease. Where any lease or agreement to use land limits or conditions in any way the applicant's access or use of the site to provide public service, a copy of the lease or agreement (which clearly indicates the limitations) shall be filed with the application.

(b) * * *

(c) Each application involving a new or modified antenna supporting structure or passive facility, the addition or removal of an antenna, or the repositioning of an authorized antenna for a station or receive-only facility (except receive-only facilities in the Multipoint Distribution Service and the Digital Electronic Message Service) must be accompanied by a vertical profile sketch of the total structure depicting its structural nature and clearly indicating the ground elevation (above sea level) at the structure site, the overall height of the structure above ground (including obstruction lights when required, lightning rods, etc.) and, if mounted on a building, its overall height above the building. The proposed antennas on the structure must be clearly identified and their heights above-ground (measured to the center of radiation) clearly indicated.

(d) Each application proposing a new or modified antenna structure for a station (including a receive-only or passive repeater) so as to change its overall height shall certify that the proposed antenna tower structure meets FAA standards, that the structure is so marked and lighted as required by FAA standards, and that any necessary notification of the FAA has been made. Complete information as to rules concerning the construction, marking and lighting of antenna structures is contained in Part 17 of this chapter. *See also* § 21.111 if the structure is used by more than one station.

(e) * * *

(1) * * *

(2) Location and telephone number of the maintenance center for a point-to-point microwave system.

* * * * *

(h) Each application in the Point-to-Point Radio, Local Television Transmission, Multipoint Distribution Service and Digital Electronic Message Service (excluding user stations) proposing a new or replacement antenna (excluding omnidirectional antennas) shall include an antenna radiation pattern showing the antenna power gain distribution in the horizontal plan expressed in decibels, unless such pattern is known to be on file with the Commission in which case the applicant may reference in its application the FCC–ID number that indicates that the pattern is on file with the Commission.

12. Section 21.17 is deleted.

13. Section 21.20 is amended by amending paragraph (b) to read as follows:

§ 21.20 Defective applications.

(a) * * *

(b) By way of illustration only, and not in any way limiting the scope of paragraph (a), the following are examples of common deficiencies which result in defective applications under paragraph (a):

(1) the application is not properly executed;

(2) the submitted filing fee (if a filing fee is required) is insufficient;

(3) the application does not demonstrate how the proposed radio facilities will serve the public need or interest;

(4) the application does not demonstrate compliance with the special requirements applicable to the radio service involved;

(5) the application does not demonstrate the availability of the proposed site of a new facility;

(6) the application does not include the environmental assessment required for any significant environment impact under the Commission's environmental rules (Part 1, subpart I);

(7) the application does not specify the polarization and, where applicable, the antenna orientation azimuth and distance;

(8) the application does not include all necessary exhibits;

(9) the application is filed after the cutoff date prescribed in § 21.30 of this part; or

(10) the application proposes the use of a frequency not allocated to such use.

(c) * * *

* * * * *

14. Sections 21.21 and 21.22 are amended by replacing the term "his" with the term "the applicant's" wherever the former term appears in those sections.

15. Section 21.23 is amended by deleting paragraph (d) and redesignating paragraph (e) as new paragraph (d) and by amending new paragraph (d) as follows:

21.23 Amendment of applications.

* * * * *

(d) The applicant must serve copies of any amendments or other written communications upon the following parties:

(1) any applicant whose application appears on its face to be mutually exclusive with the application being amended;

(2) any applicant whose application has been found by the Commission, as published in a public notice, to be mutually exclusive with the application being amended; and

(3) any party who has filed a petition to deny the application or other formal objection, when that petition has not been resolved by the Commission.

* * * * *

16. Section 21.26 is amended to read in its entirety as follows:

§ 21.26 Receipt of applications.

Applications received by the Commission are given a file number for administrative convenience. An application that after preliminary review appears complete will be put on public notice. Neither the assignment of a file number nor the listing of the application on public notice as received for filing indicates that the application has been found acceptable for filing or precludes the subsequent return or dismissal of the application if it is found to be defective or not in accordance with the Commission's rules.

17. Section 21.27 is amended to read in its entirety as follows:

§ 21.27 Public notice period.

(a) At regular intervals, the Commission will issue a public notice listing:

(1) the receipt of applications and major amendments thereto;

(2) significant Commission actions concerning applications;

(3) the filing of verifications of construction;

(4) applications for additional time to construct;

(5) information which the Commission in its discretion believes of public significance; and

(6) special environmental considerations as required by Part I of this chapter.

A public notice will not normally be issued for any of the following applications:

(1) for authorization of a minor technical change in the facilities of an authorized station where such a change would not be classified as a major amendment (as defined by § 21.23) were such a change to be submitted as an amendment to a pending application:

(2) for temporary authorization pursuant to § 21.25(b);

(3) for an authorization under any of the proviso clauses of Section 308(a) of the Communications Act of 1934 [47 U.S.C. § 308(a)];

(4) for consent to an involuntary assignment or transfer of control of a radio authorization; or

(5) for consent to a voluntary assignment or transfer of control of a radio authorization, where the assignment or transfer does not involve a substantial change in ownership or control.

(b) No application that has appeared on public notice will be granted until the expiration of a period of thirty days following the issuance of the public notice listing the application, or any major amendment thereto, or until the expiration of a period of thirty days following the issuance of a public notice identifying the tentative selectee of a random selection process, whichever is later.

18. Section 21.30 is amended by revising paragraph (b)(3) to read as follows:

* * * * *

(b) * * *

(3) Any comments on, or objections to, the grant of an application when the comments or objections do not conform to either paragraph (a) of this section or other Commission rules and requirements.

19. Section 21.31 is amended by revising subparagraph (e)(2) to read as follows:

§ 21.31 Mutually exclusive applications.

* * * * *

(e) * * *

(2) The amendment resolves frequency conflicts with authorized stations or other pending applications which would otherwise require resolution by hearing, by comparative evaluation pursuant to § 21.35, or by random selection process, *provided* that the amendment does not create new or additional frequency conflicts;

* * * * *

20. Section 21.32 is amended by changing the title to "Consideration of Applications not Included in a Random Selection Process" and by deleting the term "financially" from subparagraph (b)(5).

21. Section 21.35 is amended by replacing the term "his" with the term "the applicant's" in subparagraph (b)(1)(i), by replacing the term "his" with the term "the principal's" in subparagraph (b)(1)(iii), and by replacing the term "his" with the term "that applicant's" in subparagraph (b)(2).

22. Sections 21.39, 21.40, 21.41, 21.42, 21.43 and 21.44 are deleted. The heading "LICENSE TRANSFERS, MODIFICATIONS, CONDITIONS AND FORFEITURES" is added immediately before new Section 21.39. New Sections 21.39, 21.40, 21.41, 21.42, 21.43 and 21.44 are added, as follows:

§ 21.39 Assignment or transfer of station authorizations.

(a) No station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation or any other entity holding any such license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience and necessity will be served thereby.

(b) For purposes of this section, transfers of control requiring Commission approval shall include any and all transactions that:

(1) change the party controlling the affairs of the licensee, or

(2) affect any change in a controlling interest in the ownership of the licensee, including changes in legal or equitable ownership, or

(3) transfer any vested or contingent interest in such part of the licensee which, if directly transferred, would be an immediate controlling interest in the licensee, including but not limited to such interests as liens, mortgages, options, and powers of attorney.

(c) Requests for transfer of control or assignment authority shall be submitted on the application form prescribed by § 21.11 of this chapter, and shall be accompanied by the applicable showings required by §§ 21.13 and 21.15 of this chapter.

(d) The Commission shall be promptly notified in writing when a licensee is voluntarily or involuntarily placed in bankruptcy or receivership and when an individual licensee, a member of a partnership which is a licensee, or a person directly or indirectly in control of a corporation which is a licensee, dies or

becomes legally disabled. Within thirty days after the occurrence of such bankruptcy, receivership, death or legal disability, an application for involuntary assignment of such license, or involuntary transfer of control of such corporation, shall be filed with the Commission, requesting assignment or transfer to a successor legally qualified under the laws of the place having jurisdiction over the assets involved.

(e) The transferor of a station licensed under this part may retain no right of reversion or reassignment of the license and may not reserve the right to use the facilities of the station for any period whatsoever. No assignment of license or transfer of control of licensee will be granted or authorized if there is a contract or understanding, express or implied, pursuant to which a right of reversion or reassignment or right to use the facilities are retained as partial or full consideration for the assignment or transfer.

(f) No special temporary authority, or any rights thereunder, shall be assigned or otherwise disposed of, directly or indirectly, voluntarily or involuntarily. A special temporary authorization will transfer automatically with the transfer of control of any entity so authorized.

§ 21.40 Modification of station licenses.

(a) Except as provided in Sections 21.41 and 21.42, no modification of a license issued pursuant to this part (or the facilities described thereunder) shall be made except upon application to the Commission and upon finding by the Commission that (i) such modification will promote the public interest, convenience and necessity, or (ii) that the provisions of the Communications Act of 1934 or of any treaty ratified by the United States will be more fully complied with if such application is granted.

(b) Except as provided in paragraph (c), below, any application for modification to extend a license construction period must include a verified statement from the applicant:

(i) that additional time is required due to unforeseeable circumstances beyond the applicant's control, in which case the applicant must describe such circumstances and must set forth with specificity and justify the precise extension period requested; or

(ii) that there are unique and overriding public interest concerns that justify such an extension, in which case the applicant must identify such interests and must set forth and justify a precise extension period.

(c) Notwithstanding the provisions of paragraph (b), above, no application for modification of a license construction period will be granted if, pursuant to § 21.39, that license has been assigned or there has been a transfer of control of the licensee.

§ 21.41 Special processing of applications for minor facility modifications.

(a) Unless notified to the contrary by the Commission, as of the twenty-first day following the date of filing, any application that meets the requirements of paragraph (b) of this section and proposes only the changes specified in paragraph (c) of this section shall be deemed to have been authorized by the commisson.

(b) An application may be considered under the procedures of this section only if:

(1) it is in the Point-to-Point Microwave Radio, Local Television Transmission, Digital Electronic Message or Multipoint Distribution Services;

(2) the cumulative effect of all such appplications made within any 60 day period does not exceed the appropriate values prescribed by paragraph (c);

(3) the facilities to be modified are not located within thirty-five miles of the Canadian or Mexican border;

(4) it is acceptable for filing, is consistent with all of the Commission's rules, and does not involve a waiver request;

(5) it specifically requests consideration pursuant to this section; and

(6) frequency coordination procedures, as necessary, are complied with in accordance with § 2.100(d).

(c) The modifications that may be authorized under the procedures of this section are:

(1) changes in a transmitter and existing transmitter operating characteristics, or protective configuration of transmitter, provided that:

(i) in all radio services other than Multipoint Distribution Service, any increase in transmitter output power is less than three dB over the previously authorized output power; and in the Multipoint Distribution Service, any increase in transmitter output power is one and one-half dB or less over the previously authorized output power;

(ii) the necessary bandwidth is not increased by more than 10% of the previously authorized necessary bandwidth;

(2) changes in the height of an antenna, provided that:

(i) in all radio services except Multipoint Distribution Service, any increase in antenna height is less than twenty feet above the previously authorized height;

(ii) in Multipoint Distribution Service, any increase in antenna height is less than ten feet above the previously authorized height; and

(iii) the overall height of the antenna structure is not increased as a result of the antenna extending above the height of the previously authorized structure, except when the new height is twenty feet or less (above ground or man-made structure, as appropriate) after the change is made.

(3) change in the geographical coordinates of a transmit station, receive station or passive facility by ten seconds or less of latitude, longitude or both, provided that when notice to the FAA of proposed construction is required by Part 17 of the rules for antenna structure at the previously authorized coordinates (or will be required at the new location) the applicant must notify the FAA of the new coordinates, and certify to the Commission that such notification has been made, that the proposed structure meets FAA standards, and that the structure is marked and lighted as required by the FAA.

(4) an increase in the number of Digital Termination user stations.

(d) Upon grant of an application under the procedure of this section and at such time that construction begins, the applicant must keep a complete copy of the application (including the filing date) at the station involved if construction is commenced prior to the receipt of the authorization.

§ 21.42 Certain modifications not requiring prior authorization.

(a) Equipment in an authorized radio station may be replaced without prior authorization or notification if the replacement ("new") equipment is identical (i.e., same manufacturer and model number) with the replaced ("old") equipment.

(b) Licensees of fixed stations in the Point-to-Point Microwave Radio, Local Television Transmission, Digital Electronic Message, or Multipoint Distribution Services may make the facility changes listed in paragraph (c) of this section without obtaining prior Commission authorization, if:

(1) frequency coordination procedures, as necessary, are complied with in accordance with Section 21.100(d), and

(2) the cumulative effect of all facility changes made within any 60 day period does not exceed the appropriate values prescribed by paragraph (c) of this section, and

(3) changes to facilities are reported by the submission of a completed Revised Form X or approved alternative within thirty days after the change is made.

(c) Modifications that may be made without prior authorization under paragraph (b) of this section are:

(1) Change or modification of a transmitter, when:

(i) The new or modified transmitter is type-accepted (or type-notified) for use under this Part and is installed without deviation from the type-accepted (or type notified) configuration;

(ii) The type of modulation is not changed;

(iii) The frequency stability is equal to or better than the previously authorized frequency stability; and

(iv) The necessary bandwidth and the output power do not exceed the previously authorized values.

(2) Addition or deletion of a transmitter for protection without changing the authorized power output (*e.g.*, hot standby transmitters);

(3) Change to an antenna (other than any change involving a periscope antenna system), when:

(i) For the Point-to-Point Microwave and Local Television Transmission Services, the new antenna conforms to the requirements of Section 21.108 and has essentially the same or better radiation characteristics than the previously authorized antenna;

(ii) For the Multipoint Distribution Service and Digital Electronic Message Service, the new antenna conforms with § 21.906 and the gain of the new antenna does not exceed that of the previously authorized antenna by more than one dB in any direction.

(4) Change to the height of an antenna, when:

(i) The new height (measured at the center-of-radiation) is within ± five feet of the previously authorized height; and (ii) The overall height of the antenna structure is not increased as a result of the antenna extending above the height of the previously authorized structure, except when the new height is twenty feet or less (above ground or man-made structure, as appropriate) after the change is made.

(5) Decreases in the overall height of an antenna structure, provided that, when notice to the FAA of proposed construction was required by Part 17 of the Rules for antenna structure at the previously authorized height, the applicant must notify the FAA of the height reduction, and certify to the Commission that such notificattion was made, that the proposed structure meets FAA standards and that the structure is marked and lighted as required by the FAA.

(6) Changes in the azimuth of the center of the main lobe of radiation of a point-to-point station's antenna by a maximum of one degree.

(7) Changes to the transmission line and other devices between the transmitter and the antenna when the effective radiated power of the station is not increased by more than one dB.

(d) Licensees may correct erroneous information on a license which does not involve a major change (i.e., a change that would be classified as a major amendment as defined by § 21.23) without obtaining prior Commission approval by filing a completed FCC Form X.

§ 21.43 Period of construction, certification of completion of construction.

(a) Each license for a radio station for the services included in this Part shall specify as a condition therein the period during which construction of facilities will be completed and the station made ready for operation. Construction may not commence until the grant of a license, and must be completed by the date specified in the license as the termination date of the construction period. Except as may be limited by § 21.45(b) or otherwise determined by the Commission for any particular application, the following shall be the maximum construction periods for each service:

(1) For stations in the Point-to-Point Microwave Radio and Digital Electronic Message Service, a maximum of 18 months from the date of the license grant;

(2) For all other stations licensed under this Part, a maximum of 12 months from the date of the license grant.

(b) Each license for a radio station for the services included in this part shall also specify as a condition therein that upon the completion of construction, each licensee must file with the Commission a certification of completion of construction using FCC Form X, certifying that the facilities as authorized have been completed and that the station is now operational and ready to provide service to the public, and will remain operational during the license period, unless the license is submitted for cancellation.

§ 21.44 Forfeiture and termination of station authorization.

(a) A license shall be automatically forfeited in whole or in part without further notice to the licensee upon:

(1) the explanation of the construction period specified therein, or after such additional time as may be authorized by the Commission, unless prior thereto certification of completion of construction has been filed with the Commission pursuant to § 21.43;

(2) the expiration of the license period specified therein, unless prior thereto an application for renewal of such license has been filed with the Commission; or

(3) the removal or modification of the facilities, so as to render the station not operational.

(b) A license forfeited in whole or in part under the provisions of paragraph (a) may be reinstated if the Commission, in its discretion, determines that reinstatement would best serve the public interest, convenience and necessity. Petitions for reinstatement will be considered only if:

(1) The petition is filed within 30 days of the expiration date set forth in subparagraph (a)(1) or (a)(2), whichever is applicable;

(2) The petition explains the failure to timely file such notification or application as would have prevented automatic forfeiture; and

(3) The petition sets forth with specificity the procedures which have been established to insure timely filings in the future.

(c) A special temporary authorization shall automatically terminate upon the expiration date specified therein, or upon failure of the carrier to comply with any special terms or conditions set forth therein. Operation may be extended beyond such termination date only upon specific authorization by the Commission.

23. Section 21.100(d) is amended by deleting the first paragraph and inserting in lieu thereof the following:

(d) Frequency Coordination. When provided by the rules governing a service, the following frequency usage coordination procedures shall apply.

(1) General Requirements:

Proposed frequency usage shall be prior coordinated with existing users in the area and other applicants with previously filed applications, whose facilities could affect or be affected by the new proposal in terms of frequency interference or restricted ultimate system capacity. Coordination shall be completed prior to filing an application for regular authorization or an amendment to a pending application or a modification to a license when the proposed change is defined as "major" by the rules governing the service or is one reasonably expected to cause harmful electrical interference greater than the levels specified for the service(s) involved. In coordinating frequency usage with stations in the fixed satellite service, applicants shall also comply with the requirements of § 21.706(c) and (d). In engineering a system or modification thereto, the applicant shall by appropriate studies and analyses select sites, transmitters, antennas and frequencies that will avoid harmful interference to other users. All applicants, and licensees shall cooperate fully and make reasonable efforts to resolved technical problems and conflicts that may inhibit the most effective and efficient use of the radio spectrum; however, the party being coordinated with is not obligated to suggest changes or re-engineer a proposal in cases involving conflicts. Applicants should make every reasonable effort to avoid blocking the growth of systems that are likely to need additional capacity in the forseeable future. The applicant shall identify in the application all entities with which the technical proposal was coordinated. In the event that technical problems are not resolved or if the existing licensee, or applicant does not respond to coordination efforts within 30 days after notification, an explanation shall be submitted with the application. Where technical problems are resolved by an agreement or operating arrangement between the parties that would require special proce-

dures be taken to reduce the likelihood of harmful interference (such as the use of artificial site shielding) or would result in a reduction of quality or would result in a reduction of quality of capacity of either system, the details thereof shall be contained in the application.

24. Section 21.100(d) is further amended by combining paragraphs (d)(7) and (8) to form one paragraph (vii), by redesignating subparagraphs (1), (2), (3), (4), (5), (6), (9), (10) and (11) as subparagraphs (i), (ii), (iii), (iv), (v), (vi), (viii), (ix) and (x), by inserting a new paragraph prior to subparagraph (i) and by revising subparagraphs (viii) and (x) as follows:

(d) * * *

(1) * * *

(2) Coordination Procedure Guidelines. The following guidelines are applicable to the coordination process:

(i) * * *

* * * * *

(viii) If, after coordination is successfully completed, it is determined that a subsequent change could have no impact on some carriers receiving the original notification, it is not necessary to coordinate the change with such carriers. However, these carriers should be notified of the change and the opinion that coordination is not required for such change.

(ix) * * *

(x) Carriers should keep other carriers with whom they are coordinating advised of changes in plans for facilities previously coordinated. If applications have not been filed 6 months after coordination was completed, carriers may assume that such frequency use is no longer desired unless a second notification has been received within 10 days of the end of the 6 month period.

25. Sections 21.102, 21.103, and 21.104 are deleted and reserved, and the charts accompanying 21.103 are deleted.

26. Section 21.107 is amended by amending paragraph (c) to read as follows:

§ 21.107 Transmitter power.

* * * * *

(c) The power of each transmitter shall be maintained as near as practicable to the power input or output specified in the instrument of station authorization.

27. Section 21.109 is amended by deleting paragraphs (b) and (d), and by redesignating paragraph (c) as new paragraph (b).

28. Section 21.110 is amended to read in its entirety as follows:

§ 21.110 Antenna polarization.

Stations operating in the radio services included in this part are not limited as to the type of polarization of the radiated signal, *provided, however*, that in the event harmful interference is caused to the operation of other stations the Commission may, after notice and opportunity for hearing, order the licensee to change the polarization of the radiated signal. No change in polarization shall be made without prior authorization from the Commission.

29. Section 21.111 is amended by deleting the term "permittee," and by deleting the reference to § 21.109(b).

§ 21.113 Quiet zones.

* * *

(b) * * *

	Field Strength (mV/m) in authorized bandwidth of service	Power flux density[1] (dbW/m^2) in authorized bandwidth of service
Below 540 kHz	10	-65.8
540 to 1600 kHz	20	-59.8
1.6 to 470 MHz	10	-65.8[2]
470 to 890 MHz	30	-56.2[2]
Above 890 MHz	1	-85.8[2]

[1] Equivalent values of power flux density are calculated assuming free-space characteristic impedance of 376.7=120 ohms.

[2] Space stations shall conform to the power flux density limits at the earth's surface specified in appropriate parts of the FCC rules, but in no case should exceed the above levels in any 4 kHz band for all angles of arrival.

* * * * *

31. Section 21.116 is amended by deleting the phrase "In the preparation of the profile graphs described in § 21.115, and" from the first sentence, and by deleting entirely the sentence "Ordinarily the Commission will not require the submission of topographical maps for areas beyond 15 miles from the antenna site, but the maps must include the principal community to be served."

32. Section 21.118 is amended by deleting the last sentence in paragraph (a) and by deleting the words "(see also §§ 21.508(e) and 21.605(d).)" from paragraph (b).

33. Section 21.121 is deleted and reserved.

34. Section 21.201 is amended to read in its entirety as follows:

§ 21.201 Posting of station authorization information.

Each licensee shall post at the authorized control point of the station (or if none, at the station location) the name, address and telephone number of the custodian of the station license or other authorization.

35. Sections 21.204, 21.206, 21.207 and 21.208 are deleted and reserved.

36. Sections 21.212 and 21.213 are deleted and reserved.

37. Section 21.214 is amended by deleting the reference to § 21.611 in the parenthetical in the last sentence of the section.

38. Section 21.300 is deleted and reserved.

39. Section 21.303 is amended by inserting the phrase "Unless otherwise specified in Part 63," before the beginning of the first sentence in paragraph (b), and by adding a new paragraph (d) to read as follows:

§ 21.303 Discontinuance, reduction or impairment of service

* * * * *

(d) If any radio frequency should not be used to render any common carrier service to the public during a consecutive period of six months at any time after construction is completed and a verification has been filed under circumstances that do not fall within the provisions of paragraphs (a), (b), or (c) of this section, or if removal of equipment or facilities has rendered the station not operational, the licensee shall, within thirty days of the end of such period of nonuse:

(1) submit for cancellation the station license (or licenses) to the Commission in Washington, D.C.;

(2) file an application for modification of the license (or licenses) to delete the unused frequency (or frequencies); or

(3) request waiver of this rule and demonstrate either that the frequency will be used (as evidenced by appropriate requests for service, etc.) within six months of the end of the initial period of nonuse, or that the frequency will be converted to allow rendition of other authorized public services within one year of the end of the initial period of nonuse by the filing of appropriate applications within six months of the end of the period of nonuse.

If any frequency authorization is cancelled under this paragraph, the Commission will declare by public notice the frequency (or frequencies) vacated.

40. Section 21.304 is amended to read in its entirety as follows:

§ 21.304 Tariffs, reports, and other material required to be submitted to the Commission.

Sections 1.771 through 1.815 of this chapter contain summaries of certain materials and reports, including schedule of charges and accounting and financial reports, which, when applicable, must be filed with the Commission.

41. Section 21.306 is amended by deleting the term "permittees and" from the title and from the first sentence.

42. Section 21.400 is amended by deleting the comma after the term "legally", and by deleting the term "financially" from the section.

43. Section 21.401 is amended by amending paragraph (b) to read as follows:

§ 21.401 Scope of service.

* * * * *

(b) the testing of existing or authorized antennas, wave guides, or transmission paths.

44. Section 21.402 is amended by deleting the term "construction permit or" from the section.

45. Section 21.403 is amended by replacing the term "construction permits for" with the term "developmental authority" in paragraph (b).

46. Section 21.405 is amended by amending paragraph (a) to read as follows:

§ 21.405 Supplementary showing required.

(a) Authorizations for development of a proposed radio service in the services included in this part will be issued only upon a showing that the applicant has a definite program of research and development, the details of which shall be set forth, which has reasonable promise of substantial contribution to these services

within the term of such authorization. A specific showing should be made as to the factors which qualify the applicant technically to conduct the research and development program, including a description of the nature and extent of engineering facilities that the applicant has available for such purposes.

(b) * * *

47. Section 21.500 is amended by deleting the term "financially" from the section, by deleting the last two sentences and inserting in lieu thereof the following:

Each application will identify the Standard Metropolitan Statistical Area (SMSA) within whose boundaries the DTS nodal station will be constructed and which the facility will serve.

48. Section 21.501 is amended by replacing the reference in the section to § 21.7(c) with § 21.7.

49. Section 21.502 is amended by deleting the first paragraph and inserting in lieu thereof the following paragraphs (a), (b) and (c), by deleting paragraphs (e)(2) and (f) and by redesignating (b), (c), (d), (e), (g) and (h) as (d), (e), (f), (g), (h), and (i) respectively.

§ 21.502 Frequencies.

(a) Frequencies in the bands 10,550 - 10,680 MHz and 17,700 - 19,700 MHz are available for assignment for all DEMS applicants. Assignments will consist of a pair of channels as set out in paragraphs ___ plus internodal channels as set out in paragraph ___ of this section.

(b) Applicants and licensees in the 10 GHz band may apply for an additional channel pair in that band *provided* the proposed channel assignments, when aggregated with any previously proposed or granted channel assignment in the 10 GHz band, would not result in the applicant or licensee being granted more than 5 MHz of bandwidth in the 10 GHz band in the SMSA, excluding internodal channels.

(c) Except as provided in (b), licensees may apply for an additional channel pair in an SMSA only:

(i) when it has operated its previously authorized DTS for one year, and

(ii) the DTS is operating at or near the expected capacity and the service to be provided will fully utilize all spectrum requested.

* * * * *

50. Section 21.504 is amended by deleting the comma after the term "Licensees," and by deleting the term "permittees" from the section.

51. Section 21.700 is amended to read in its entirety as follows:

§ 21.700 Eligibility.

(a) Authorization for stations in this service will be issued to existing and proposed communications common carriers. Applications will be granted only in cases in which it is shown that:

(1) the applicant is legally, technically, and otherwise qualified to render the proposed service;

(2) there are frequencies available to enable the applicant to render a satisfactory service; and

(3) the public interest, convenience, or necessity would be served by a grant thereof.

(b) No station or radio frequency in this service will be authorized, or may be utilized, to transmit any closed circuit television signals or television signals other than broadcast television signals, the content of which is originated, selected, controlled, or otherwise substantively influenced by the applicant, licensee, or a closely affiliated entity, unless:

(1) such service is otherwise permitted for a specific length of time by grant of an acceptable petition for waiver of this rule; or

(2) such service is otherwise permitted by a condition in the applicable instrument of authorization; or

(3) such service is provided pursuant to applicable FCC tariff and is temporary and occasional intra-company television communication for management, network supervision, or other internal carrier functions.

For purposes of this paragraph, an entity will be considered to be "closely affiliated" with an applicant if they are in a parent-subsidiary relationship, or both are commonly controlled, or they have any common officers or management employees.

(c) Applications for stations or frequencies that will be used primarily to relay broadcast television signals must include a demonstration (including appropriate system diagrams and tables) that at least fifty percent of the customers (or points of service) on the microwave system involved, including those served through an interconnecting carrier(s), receiving applicant's service, will not be related or affiliated in any degree with the applicant, and that the proposed usage by such customers, in terms of hours of use and channels delivered, shall constitute at least fifty percent of the usage of the applicant's microwave service. Applications that do not contain these demonstrations will be returned as unacceptable for filing.

52. Section 21.704 is amended to read in its entirety as follows:

§ 21.704 Modulation requirements.

When amplitude modulation is used, the modulation percentage shall be sufficient to provide efficient communication, and shall normally be maintained above 70 percent on peaks but shall not exceed 100 percent on negative peaks.

53. Section 21.706 is amended by adding a new paragraph (c) as follows and by redesignating current paragraph (c) and (d) as (d) and (e):

§ 21.706 Supplementary showing required with applications.

(a) * * *

(c) All applicants for regular authorization under this subpart shall, before filing an application or major amendment or major modification to a license, coordinate proposed frequency usage with existing users in the area and other applicants with previously filed applications, in accordance with the procedures in § 21.100(d).

(d) * * *

(e) * * *

54. Section 21.707 is amended by deleting the words "applications (FCC Forms

401 and 403)" in paragraph (a)(2) and inserting in lieu thereof the words "an application (FCC Form X)" and by deleting the words "FCC Form 403 for simultaneous consideration provided the equipment to be used is of "packaged" design" in paragraph (b) and inserting in lieu thereof "FCC Form X."

55. Section 21.708 is amended by deleting the reference to § 21.214 in paragraph (c) and inserting in lieu thereof a reference to § 21.201.

56. Section 21.709 is amended by deleting paragraphs (b) and (d), by redesignating paragraph (c) as new paragraph (b), and by revising paragraph (a) to read as follows:

§ 21.709 Renewal of station licenses.

(a) An application for renewal of a license of a station in the Point-to-Point Microwave Service primarily used to relay television signals shall contain: (1) a statement that such use complies with Section 21.700(b); and (2) the demonstration required by Section 21.700(c). Applications that do not contain these items as appropriate will be returned as unacceptable for filing.

(b) * * *

57. Section 21.712 is reserved.

58. Section 21.713 is deleted and reserved.

59. Section 21.800 is amended by deleting the term "financially," from the section.

60. Section 21.807 is amended replacing the reference to FCC Forms 401 and 403 in subparagraph (a)(2) with FCC Form X, by adding a new paragraph (c) and by amending paragraph (b) to read as follows:

§ 21.807 Stations at temporary fixed locations.

(a) * * *

(b) Applications for authorizations to operate stations at temporary locations under the provisions of this section may be made upon FCC Form X. Blanket applications may be submitted for the required number of transmitters.

(c) All applicants for regular authorization under this subpart shall, before filing an application or major amendment or major modification to a license, coordinate proposed frequency usage with existing users in the area and other applicants with previously filed applications, in accordance with the procedures in § 21.100(d).

61. Section 21.808 is amended by deleting the reference to § 21.214 in paragraph (c) and inserting in lieu thereof a reference to § 21.201.

62. Section 21.906 is amended by inserting after the last sentence in paragraph (a), the following:

When an applicant proposes to employ a directional antenna, the applicant shall provide the Commission with information regarding the orientation of the directional antenna, expressed in degrees of azimuth, with respect to true north.

63. Reference to Subpart L is deleted.

Stay Pending Appeal

Review Board denies stay of order disqualifying counsel pending disposition of an appeal.
—*Dorothy J. Owens*
MM Docket No. 85-267

FCC 86R-37

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	MM DOCKET NO. 85-267
DOROTHY J. OWENS	File No. BPCT-850222KG
HAROLD L. MULLICAN	File No. BPCT-850422KJ
LASH COMMUNICATIONS, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPCT-850422KK
LIBERTY BROADCASTING CORPORATION	File No. BPCT-850422KS
CROWN CITY TV, INC.	File No. BPCT-850422LA
For Construction Permit for a New Television Station Bakersfield, California	

MEMORANDUM OPINION AND ORDER

Adopted: May 29, 1986; Released: June 2, 1986

BY THE REVIEW BOARD:

1. The Review Board has under consideration a motion filed May 22, 1986 by Liberty Broadcasting Corporation (Liberty) for a limited stay of an oral ruling by Presiding Administrative Law

Judge Joseph Stirmer (ALJ) disqualifying its counsel, Seymour M. Chase, from further participation in this proceeding.[1] By Order, FCC 86M-1735, released May 22, 1986, the ALJ postponed the scheduled hearing in this proceeding until September 16, 1986.[2] Movant, however, seeks a stay of the instant disqualification order pending disposition of an appeal it intends to file.[3] It argues that various petitions before the ALJ are currently pending in which the pleading cycles have not been completed nor have the procedural dates been suspended. Liberty contends that forcing it to engage other counsel for such matters would be a substantial and unnecessary burden.

2. The motion for limited stay will be denied.[4] Initially, Liberty has not made the stringent showing required for issuance of a stay. *See Virginia Petroleum Jobber's Ass'n.* v. *FPC*, 259 F. 2d 921 (D.C. Cir. 1958), and *Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F. 2d 841 (D.C. Cir. 1977). That is, Liberty has not shown irreparable injury to itself; unsubstantial harm to other parties; likelihood of prevailing on the merits; and that the public interest would be served. *Id.* The sole argument proffered that retention of new counsel would impose a substantial burden on the applicant cannot seriously be said to constitute irreparable injury in light of precedent that litigation expenses alone do not constitute such injury. *See Shurberg Broadcasting of Hartford, Inc.*, v. *FCC*, No. 84-1600 (D.C. Cir. December 21, 1984), relying on *Renegotiation Bd.* v. *Bannercraft Clothing Co., Inc.*, 415 U.S. 1 (1974). Moreover, the motion is woefully deficient in providing us with relevant information to judge whether the requested relief is warranted. No transcript of the oral ruling or description of it was submitted; no reference to any order by the ALJ was cited; and no details depicting the particulars of the ALJ's actions were offered. Nor did Liberty's brief and generalized motion provide any specifics as

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[1] Memorialized by Memorandum Opinion and Order, FCC 86M-1774, released May 23, 1986.

[2] Section 1.301(a)(5) of the Commission's Rules, 47 CFR 1.301(a)(5), requires a presiding officer to adjourn the hearing, after making a ruling removing counsel from hearing, for such period as is reasonably necessary for the client to secure new counsel and for counsel to become familiarized with the case.

[3] Liberty requested, and received from the Board, an extension of time to and including May 30, 1986, within which to file an appeal from the ALJ's ruling. Letter from Chief for Law Allan Sacks dated May 23, 1986.

[4] Because the time factors involved warrant action on the motion prior to the expiration of time for filing responsive pleadings, the Board has considered Liberty's motion without waiting for such pleadings. Section 1.298(a) of the Commission's Rules, 47 CFR 1.298(a).

to when pleadings or other pre-hearing actions on its behalf are due. In any event, we believe clarification of the scope of the ALJ's ruling postponing the hearing and his treatment of related procedural dates is a matter that should initially be addressed to the presiding Judge. Our denial of Liberty's motion, therefore, is without prejudice to the applicant's filing of a proper motion seeking such clarification from the presiding ALJ.

3. ACCORDINGLY, IT IS ORDERED, That the motion for limited stay, filed May 22, 1986, by Liberty Broadcasting Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

ERIC T. EBENSON, *Member, Review Board*

Frequency Allocation, FM
Rulemaking, Notice of Proposed

Notice of Proposed Rulemaking adopted to review and correct inconsistencies in FM Allocation Rules of Part 73, Subpart B, FM Broadcast Stations.
—FM Technical Rules
MM Docket No. 86-144

FCC 86-169

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Review of Technical Parameters For FM Allocation Rules of Part 73, Subpart B, FM Broadcast Stations	MM Docket No. 86-144

NOTICE OF PROPOSED RULE MAKING

Adopted: April 11, 1986; Released: April 21, 1986

BY THE COMMISSION:

INTRODUCTION

1. The Commission, on its own motion, initiates this proceeding to review and to correct inconsistencies in certain FM technical rules. Specifically, this *Notice of Proposed Rule Making (Notice)* will focus on issues raised as a result of BC Docket 80-90.[1]

2. In its *Report and Order* (*Report*) in Docket 80-90, the Commission amended the FM broadcasting rules to accommodate more stations in the FM band by increasing the number of station classes form three to six and adjusting several rules accordingly. However, the *Report* postponed addressing certain rules which were not directly affected by the class modifications. Additionally, the method of determining station class and the facilities permitted for each station class needs clarification. The proposed amendments will address these concerns.

[1] *See Report and Order* in BC Docket No. 80-90, FCC 83-259, 48 Fed. Reg. 29486, June 27, 1983, 94 FCC 2d 152 (adopted May 26, 1983); recon., 49 Fed. Reg. 10260, March 20, 1984 (adopted March 1, 1984).

BACKGROUND

3. Because this proceeding concerns so many aspects of the FM allotment process, a review of the pertinent FM definitions and the technical structure defined in the Rules is appropriate. The FM band extends from 88–108 MHz and is divided into 101 channels, numbered from 200 to 300. Channels 200 through 220 are reserved for noncommercial use only.[2] The use of channels 221 through 300 is defined by the FM Table of Allotments (Table) found in Section 73.202(b) of the Commission's Rules. The Table lists the communities in which stations are operating (or may operate), the allotted channels, and the classes of stations allowed.

4. The Commission authorizes six classes of commercial FM stations: A, B1, B, C1, C2, and C. The different station classes are intended to provide for different ranges of service and are afforded appropriate facilities to meet this goal. For example, Class A stations are intended to provide local service and are given facilities which allow them to serve approximately 700 square miles. At the other extreme, Class C stations are intended to serve larger areas, over 10,000 square miles. For each class of station, there are maximum and minimum permitted power levels. Antenna height requirements are also specified. This can give rise to inconsistent situations (e.g., a station's power may fall into one class, but the antenna height may fall into a different class).

5. When a party wants a new station at a community not alloted in the Table, the Table must be amended through a rule making proceeding to add the allotment. Modifications to existing allotments in the Table, such as changing the channel or class designation, also require amending the Table. Any requested new or modified allotment must meet certain minimum distance requirements to other co-channel and adjacent channel stations to prevent interference. They must also be capable of providing a strong signal over the desired community. The distance separation requirements (as defined in Section 73.207) are based upon the assumption that each station is currently, or at some future time will be, operating with maximum facilities (effective radiated power (ERP) and antenna height above average terrain (HAAT)) applicable to the class of allotment.

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[2] This proceeding will not address the authorization procedures for channels 200 through 220. We do recognize, however, that some of the proposed changes herein may indirectly affect stations operating on these channels.

ISSUES

The issues under consideration in this proceeding are:

1. Power and antenna height requirements.
2. Reserved Class A channels.
3. Designation of station classes.
4. Prediction of coverage.
5. Intermediate Frequency (IF) separations.
6. Miscellaneous.

Each issue will be developed separately.

ISSUE 1: POWER AND ANTENNA HEIGHT REQUIREMENTS

6. Section 73.211 lists the permitted minimum and maximum facilities (power and antenna heights) for each class of station.[3] A summary of the pertinent parameters for each class of station in each zone is listed below (station classification, minimum and maximum facilities).[4] The Table also includes the predicted maximum distances to the 1 mV/m contours.[5]

		Minimum			*Maximum*	
Class	*Power (kW)*	*Height* (meters)*	*Distance (kilometers)*	*Power (kW)*	*Height (meters)*	*Distance (kilometers)*
Zone I: A	0.1	30	5.7	3	100	24.1
(& I-A) B1	3.1	30	13.3	25	100	39.1
B	25.1	30	22.8	50	150	52.1
Zone II: A	0.1	30	5.7	3	100	24.1
C2	3.1	30	13.3	50	150	52.1
C1	50.1	30	26.7	100	299	72.3
C	100.0	300	72.4	100	600	91.7

(*Although only the Class C station has a minimum antenna height, the Rules indicate that a minimum of 30 meters should be assumed when computing the distance to the 1 mV/m contour.)

7. The Table appears to permit a continuous range of facilities and, except for Class C, overlap from one class of station to another. However, certain combinations of power and antenna

[3] The Rules also allow for an antenna to be constructed at a high elevation where its HAAT is above the normal limit (such as on a mountain top). In this case, the effective radiated power must be reduced to restrict the signal range to be equivalent to that provided by the normal maximum height and power.

[4] The U.S. is divided into three zones (I, I-A, and II), based on population density. In general, lower transmitter powers are permitted in densely populated areas to allow for more stations.

[5] Stations authorized to Puerto Rico and the Virgin Islands have different maximum facilities. *See* Section 73.211.

heights can occur that do not conform to any defined station class. For example, facilities of 20 kW at 140 meters exceed the Class B1 maximum antenna height of 100 meters but the power is less than the minimum requirement of 25.1 kW for Class B stations. Even adjusting for excessive antenna heights, the power exceeds the 16 kW permitted for equivalent Class B1 operation when using a 140 meter antenna height. Thus, such facilities currently do not conform to any station class.

8. This disparity becomes more acute with Class C1 and C facilities. Stations of 100 kW are classified either as Class C1 or C depending on whether their antenna heights are below or above 299 meters. However, there are also certain combinations of power and antenna heights that do not conform to either the Class C1 or C specifications. (For example, an application proposing 70 kW at 400 meters, with the distance to its 1 mV/m contour of 78 kilometers, would be rejected because it falls outside the limits of accepted parameters for both the Class C1 and Class C stations.)

9. The Commission believes that the current classification scheme imposes unnecessary operating restrictions on licensees. Additionally, a review of these allocation requirements is necessary to provide guidance to those stations subject to reclassification on March 1, 1987.[6] Therefore, we propose that the minimum power and antenna height requirements (and the equivalence definition in Section 73.211) be replaced with a formula reflecting the expected distance to the 1 mV/m contour. Stations would be permitted (power/height) combinations based on an index method discussed below. This procedure would prevent class discrepancies from occurring and permit a continuous range of facilities as was originally intended in Docket 80-90.

10. Under our proposal, stations would be subject to the following maximums and would be classified accordingly. Additionally, the height could exceed the class maximum if the radiated power is reduced to maintain the maximum class index. However, powers could not exceed the maximum for the class, regardless of the distance to the 1 mV/m contour. The following table lists the maximum facilities permitted for each class of

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[6] In accordance with the provisions of Docket 80-90, existing stations have been provided three years, until March 1, 1987, to expand their facilities to meet the minimum requirements of the Docket 80-90 adopted classification scheme. On that date, all FM stations will be reclassified to reflect their authorized or requested facilities.

station by its power and antenna heights or alternatively by its index.

Class	*Power (kW)*	*Height (meters)*	*Index*
A	*3*	*100*	*52*
B1	*25*	*100*	*60*
B	*50*	*150*	*68*
C2	*50*	*150*	*68*
C1	*100*	*299*	*77*
C	*100*	*600*	*85*

Index = 10 log (power) + 23 log (height) [*See* footnote[7]]

The minimum requirement for a particular class would be that either the power or the index must exceed the maximum of the next lower class of station for its zone of operation. However, where the power/height combination clearly exceeds the maximum, the next higher class would be assigned. Thus, a station's class would be determined by: first, its power; next, its power/height combination; and last, its index. *Further, it should be noted that the proposed requirements are maximums for each class and a station's index does not necessarily exceed the index of a lower class.* As examples, certain stations would be classified as follows:

Zone	*Power (kW)*	*Height (meters)*	*Index (rounded)*	*Class by*	*Class Determined*
I	2.95	119	52	A	index
I	3	110	52	B1	power/height
I	20	140	62	B	index
II	60	100	64	C1	power
II	70	400	78	C	index
II	100	301	77	C	power/height

[7] The equation is an approximation denoting a power vs. antenna height representation for maintaining a constant distance to the 1 mV/m contour with various combinations of powers and antenna heights. The permitted power vs. antenna height curve for each class of station was plotted and approximated by a straight line (power in dBk, height in meters). These straight line representations were averaged to yield a uniform slope and a range of intercepts "indexed" to the maximum facilities for each class of station. The index value was rounded to permit the greatest number of existing stations to be unaffected by the proposed change in criteria. Assuming the distance to the 1 mV/m contour to be linear with different facility combinations, plus averaging the straight line representations for the different station classes, would result in less accuracy than directly computing the distance using the propagation curves (maximum variation, 1 dB). However, this proposed approximation would foster a simplified classification approach.

11. The Commission recognizes that many licensees are currently planning facilities modifications to comply with Docket 80-90 (*See* footnote 6). An examination of the Commission's records (licenses, construction permits, and applications on file) reveals that only 49 of the over 8,000 educational and commercial records would be subject to a different classification with adoption of the above procedure. These classification changes would be due to numerical rounding from relying on the index method rather than computing the distance to the 1 mV/m contour.[8] Thus, a vast majority of the licensees or applicants would not be affected by this proposal.[9] Those stations, or applications on file as of the adopted date of this *Notice* (April, 1986), that would be adversely affected by this proposal, would automatically be waived to retain their classification based on their 1 mV/m contour, unless the licensee or applicant specifically requests reclassification.

12. As stated earlier, the above-proposed procedure would prevent discrepancies (in classes) from occurring and permit a continuous range of facilities, as was originally intended in Docket 80-90. It would also eliminate confusion in the processing of applications (especially for facilities with combinations of powers and antenna heights that do not clearly fall within any of the six classes of stations) and would thus expedite processing for those applications. Finally, the revised procedures would provide guidance to those stations subject to reclassification on March 1, 1987.

ISSUE 2: RESERVED CLASS A CHANNELS

13. Section 73.206(a) of the Commission's Rules reserves 20 of the 80 channels available to commercial stations for exclusive use by Class A stations. (Originally, Class A stations were restricted only to these twenty channels.) However, in an effort to increase the FM service, the Commission (in Docket 80-90) permitted Class A stations to be licensed on all commercial channels. The Commission did not, however, allow use of the Class A channels

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[8] Of the 49 classification changes, 7 would not be adversely affected, 25 would have facilities exceeding the maximums permitted in their new class, and 17 would be subject to a lower classification.

[9] The Commission will issue a Public Notice containing the proposed class of station for each affected FM license, construction permit, and application on file that will be reclassified on March 1, 1987.

for higher classes of stations.

14. The original intent for reserving these 20 channels for Class A stations was to assure that allotments would be available for local FM service in small communities. Higher powered stations were not allotted on these channels because their presence would limit the number of Class A allotments on these channels.[10] Since the implementation of Docket 80-90, however, the Commission has found that retention of the 20 reserved channels has caused unnecessary restrictions for Class A stations operating on these reserved channels that wish to upgrade their facilities. Such stations must now change channels even if the upgrade in class could be accommodated on the reserved channel. Further, in view of the additional channels made available to Class A stations, the Commission questions whether it is still necessary to foster local FM service by reserving these channels. Therefore, because of the maturity of the service and because of our desire to reduce the burdens on Class A station operators wishing to upgrade their facilities, we propose to allow higher classes of stations on the Class A channels, consistent with the permitted distance separations in Section 73.207.[11]

ISSUE 3: DESIGNATION OF STATION CLASSES

15. Currently, listings in the FM Table of Allotments (Table) provide the channel and class of station that is authorized to the given community. The class specified in the Table is dependent upon the FM zone as determined by the community's geographical coordinates. Section 73.206(c), on the other hand, specifies that the location of the transmitter determines the class of a licensed station.[12] Consequently, when a station's transmitter is located in a zone different from that of the community listed in the Table, the assigned station class conflicts with that given in the Table.[13]

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[10] For example, a co-channel Class A station, to avoid harmful interference, must be separated from a Class C station by a distance of 222 kilometers (138 miles), whereas only a 105 kilometer (65) mile distance separation is necessary to protect another Class A station. (These distances are for the protection of the 1 mV/m contour). This means that the density of Class A stations can exceed that for Class B or C stations.

[11] This proposal is consistent with a pleading filed by LaSalle County Broadcasting in response to a *Notice of Proposed Rule Making*. (*See Notice of Proposed Rule Making* in MM Docket 85-313, FCC 85-569, 50 Fed. Reg. 45439, October 31, 1985 (adopted October 17, 1985)). Therefore, we will consider that pleading as part of this Docket.

[12] There are a few exceptions where the assignment of the station class was not determined by the transmitter location.

[13] For example, an applicant for a community located in Zone II, designated in the Table as a Class C1, may wish to locate its transmitter on a hill in Zone I,

16. To resolve the above discrepancy, we propose to remove the transmitter location reference in Section 73.206(c), so that any new station's facilities would be required to conform to the class listed in the Table, based upon the location of the community. Stations near the zone boundary would be permitted to locate their transmitters across the boundary if the minimum distance separations for the class listed in the Table are met. For existing stations' classes that were designated by transmitter site rather than by Table allotment, we propose to adjust the Table to reflect the authorized station class, as of the adopted date of this *Notice*, regardless of the community of license. However, we invite comments on whether a grandfathered Class C station (transmitter located in Zone II) serving a community in Zone I, should retain its status or should it be downgraded if the licensee decides to move the transmitter into Zone I. Under our proposal, stations would permanently retain their class as of the adoption date of this *Notice*, regardless of which zone their transmitters may eventually be located.

17. On a related issue, parties requesting to operate on an unoccupied allotment with the facilities of a lower class of channel ("downgrade") than that listed in the Table, now must first file a rule making petition requesting a channel reclassification amendment of the Table of Allotments. These parties must petition for a "downgrade" even if no other application was submitted for that allotment during the window period when competing applications were filed.[14] Because sufficient opportunity was given for the interested parties to file for the allotted facilities during the window period for that channel, no purpose is served in requiring a rule making process to "downgrade" the channel.[15] In addition, this procedure would parallel the procedure for existing licensees to apply to downgrade their currently authorized station classes without going through a rule making proceeding (*See* footnote 1). Thus, such filings create an unnecessary burden for both the applicant and the Commission. Therefore, we propose to allow,

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where only Class A, B1, or B stations are permitted. This situation would create processing problems because the assignment of the class of station determines the minimum spacings and permitted facilities.

[14] To avoid an avalanche of applications, when the Commission added the approximately 700 new allotments to the Table, "window periods" were announced to permit filing of applications by channel number. During these periods, only applications for specific allotments are accepted.

[15] An opportunity to file conflicting proposals for other communities would not be appropriate because such attempts would be viewed as late filed. This is due to the fact that an opportunity for such proposals was available during the window for that allotment.

after the window period, applicants to directly apply for facilities on the same channel which would be reclassified (downgraded) without going through the rule making process.[16] The Table would simply be amended by a subsequent Order upon issuance of the license application.

ISSUE 4: PREDICTION OF COVERAGE

18. The prediction of coverage, as prescribed in Section 73.313, is based only on the horizontally radiated power of the FM antenna. However, factors such as beam tilt, or depression angle[17] can also affect coverage predictions. This is particularly true when a station uses a high gain transmitting antenna with a relatively narrow vertical radiation pattern and employs beam tilt. In these situations, the power radiated in the horizontal plane (straight-out), is less than that directed at an angle toward the earth's surface (radio horizon). Thus, the lesser power radiated in the horizontal plane reduces the accuracy of the theoretical prediction of coverage versus the actual coverage.[18] Until recently, FM stations rarely used sophisticated antenna designs and thus, the simple method was adequate. However, the FM broadcast service has matured and, as a result, higher antenna heights and more complex antennas are becoming commonplace.

19. Our preliminary investigations indicate that substantial corrections to the prediction of coverage may be realized by simply employing the maximum ERP of the main radiated lobe regardless of orientation rather than solely upon the horizontal. Consideration of the depression angle, as used in the television prediction, is unnecessary for FM predictions except when stations operate at antenna heights greater than 300 meters and employ very narrow vertical patterns with substantial beam tilt (over 3 degrees). Therefore, we propose modifications of the

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[16] The hierarchy of station classes would be as follows (from the lowest to the highest): Class A, B1, B, or C2 (co-equal), C1, and C. Normally, Classes B and C are not permitted in the same zone.

[17] The depression angle is used to compensate for the curvature of the earth when the station antenna is at high elevations.

[18] On April 1, 1970, the Commission recognized the potential for inaccurate determinations and revised the method for prediction of coverage of TV broadcast stations (Section 73.684). (*See* the *Report and Order* in Docket No. 17253, FCC 70-345, 22 FCC 2d 354.) Further, on November 26, 1985, a petition for rule making, filed by the firm of du Treil-Rackley, Consulting Engineers, requested a similar amendment of Section 73.313, Prediction of coverage (for FM broadcast stations). Because this rule making addresses the issue in that petition, it is hereby dismissed without prejudice. However, the petition will be retained as part of the official record in this Docket.

prediction of coverage to require calculations to be based on the maximum ERP of the main radiated lobe regardless of orientation. We request comments on this proposal and on whether other refinements are necessary. Specifically, we solicit information on the degree of inaccuracy which will persist if we retain our present rules and ignore the vertical pattern in the coverage calculations.

ISSUE 5: INTERMEDIATE FREQUENCY (IF) SEPARATIONS

20. Section 73.207 specifies the minimum distance requirements for stations separated in frequency by 10.6 or 10.8 MHz. This is required to prevent intermodulation interference in the intermediate frequency (10.7 MHz) used in most FM receivers.[19] To prevent such interference from occurring, the Commission, in 1965, concluded that "on an average basis the stations should be spaced to avoid the overlap of the 20 mV/m contours."[20] Minimum distance requirements were then developed to prevent that overlap.

21. However, those minimum distance requirements prescribed in the Rules for IF interference protection do not necessarily prevent the overlap of the 20 mV/m contours between stations. In many cases, more severe overlaps actually occur.[21] Despite this discrepancy, the Commission is not aware of widespread IF interference problems. This would suggest that the distance separation requirements in use today are adequate to avoid IF interference problems.

22. In view of the 20 years of operating experience, we suggest that the IF distance separations prescribed in the Rules rather than the 20 mV/m contours as discussed in the original order (*See* footnote 20) is the appropriate standard for avoiding IF interference. Thus, we propose to modify the IF distance separations for station classes B1, C1, and C2 to provide non-overlap of the 30 mV/m contour which represents the average (contour) separation for all station classes currently (*See* footnote 21). However, because of the lack of recent data, we invite new test measure-

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[19] Incoming signals are converted to an intermediate frequency in receivers for amplification and bandwidth processing. Any mix of input frequencies to the receiver that can cause a difference frequency of 10.6 through 10.8 MHz can cause interference.

[20] *See Report and Order* in Docket No. 15934, FCC 70-345, 30 Fed. Reg. 8680, July 9, 1965, 5 RR 2d 1679 (adopted June 30, 1965).

[21] Contour calculations of the minimum separation requirements for IF (10.6/10.8 MHz) in the Rules, indicated that they approximate non-overlap of contours varying form 24 to 36 mV/m dependent upon station class.

ments and updated information about the extent of intermodulation interference with the comments on this issue.

ISSUE 6: MISCELLANEOUS

23. When the maximum power and distance separation requirements were adopted in 1962,[22] there were a number of existing stations that did not meet the newly adopted distance requirements. Thus, they were considered as short-spaced. In 1964, the Commission adopted several provisions to permit these stations to modify their facilities while still retaining or aggravating the short-spaced condition.[23] However, when the provisions of Docket 80-90 for the reclassification of some stations become effective (*See* footnote 5), these short-spacing provisions will no longer be adequate. These 1964 rules have no provisions for the three new classes of stations created in that same docket. We believe that updating these rules for short-spaced stations is unnecessary because these stations (existing prior to 1964) have had ample time to make changes to their facilities. Therefore, we propose to delete the provisions that would worsen short-spacing in the Rules as of the reclassification date.[24] Under this proposal, after March 1, 1987, the actual separations involving existing short-spaced stations would become the minimum requirement for the stations involved. These stations could modify their facilities, as the need arises (after March 1987), if they do not extend their 1 mV/m field strength contour in any direction where the minimum distance is not met.

24. When the Commission converted the FM rules to the metric system, the tables used to determine the distance between points were replaced by a set of equations. Because some questions have been raised about conversion factors, more precise equation coefficients are proposed to better reflect the tables previously used.[25] We request comments on this and other accuracy prob-

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[22] *See First Report and Order* in Docket No. 14185, FCC No. 62-866, 23 RR 1801, 33 FCC 2d 309 (adopted by the Commission on July 25, 1962).

[23] *See Fourth Report and Order* in Docket No. 14185, 3 RR 2d 1571, 40 FCC 868 (adopted by the Commission on October 7, 1964).

[24] We also seek comment in the instant proceeding on whether the policy of permitting increases in the facilities of the short-spaced FM stations beyond the maximum facilities provided for in Section 73.213(a) of the Rules, where a mutual agreement exists between stations, should be retained. (*See* Section 73.4235; reference to Public Notice, FCC 75-1367, dated December 15, 1975, 57 FCC 2d 1263; 40 Fed. Reg. 58893, December 19, 1975.)

[25] *See Tables for a Polyconic Projection of Maps and Lengths of Terrestrial Arcs of Meridian and Parallels based upon Clarke's Reference Spheroid of 1866*; U.S. Department of Commerce; Coast and Geodetic Survey; Special Publication No.

lems. The new equations are shown in the accompanying appendix under Section 73.208. Basically, the coefficients are more precise in the revised equations. Finally, to add clarity to the Rules, we are also proposing nonsubstantive changes to Sections 73.1030 and 73.1690 of the Rules. These proposed changes are reflected in the attached appendix.

25. REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

I. Reason for action:

This action clarifies certain FM rules which may be outdated or overly complicated as a result of Docket 80-90. This action is also taken to simplify procedures by proposing unified FM standards for all stations, regardless of when the station was authorized for operation.

II. The objective:

Through this proceeding, the Commission proposes to make the FM rules simpler and thus encourage flexibility in the industry. The action is further intended to unify the FM rules, thus eliminating the confusion over which rules apply to which stations.

III. Legal basis:

Sections 4 and 303 of the Communications Act of 1934, as amended.

IV. Description, potential impact, and number of small entities affected:

There are approximately 3,846 commercial FM stations and 1,220 educational FM stations currently in operation. The *Notice* contains one proposal (to replace the minimum power and antenna height restrictions with equations that would represent a continuous range of facility options) that could have a minimal negative impact on 49 stations currently in the process of expanding their facilities to avoid the reclassification deadline of March 1, 1987, as detailed in Docket 80-90. This action is proposed to offset the confusion caused when certain combinations of power and antenna heights do not correspond to any of the station classes defined in Docket 80-90. Although the proposed solution could cause some stations to be designated in a less desirable station class than

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5; 1946 Reprint, Sixth Edition; Washington, D.C.

expected, the current conflict between these requirements and the classification scheme enacted in Docket 80-90 demands rectifying. The affected stations will, however, retain the classifications they originally anticipated. Therefore, this action will have no adverse impact. We have evaluated both the positive and negative impacts this proposal could have on existing stations and believe that the proposed equations will minimize the possible negative effects of this modification, while still providing a satisfactory solution to the problem.

V. Recording, record keeping, and other compliance requirements:

None.

VI. Federal rules which overlap, duplicate, or conflict with this rule:

None.

VII. Any significant alternatives minimizing impact on small entities and consistent with the stated objective:

As discussed above, the maximum and minimum power and antenna height restrictions, in some instances, conflict with the classification scheme mandated in Docket 80-90. Other than the solution proposed in the *Notice* (and discussed above), two options are available to the Commission that would rectify the discrepancy. First, we could propose the repeal of the reclassification portion of Docket 80-90, thus leaving existing stations at their present station class. This would settle the inconsistencies, but the issue leading to the reclassification (as indicated in Docket 80-90, existing under-utilized FM stations were unfairly precluding availability at other locations) would still exist. Second, we could apply the reclassification scheme only to new applicants. This option, however, would fail to provide guidelines to existing licensees. Thus, although either of these options would clear up the conflict between these requirements and the reclassification scheme, neither would satisfy the intent expressed in the *Report and Order* in Docket 80-90.

26. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals advanced herein. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the

rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall cause a copy of this *Notice of Proposed Rule Making*, including the initial Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.*, (1981)).

PAPERWORK REDUCTION ACT STATEMENT

27. The proposal contained herein has been analyzed with respect to the Paperword Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirement; and except for a small adjustment due to the additional applications expected to be received, the proposed rules would not increase or decrease burden hours imposed on the public.

EX PARTE CONSIDERATIONS

28. For purposes of this nonrestricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rule making until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceedings. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral presentation addressing matters not fully covered in any previously filed written comments must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's Rules, 47 CFR 1.1231.

29. Pusuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before June 12, 1986, and reply comments on or before June 27, 1986. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W. 20554.

ORDERING CLAUSES

30. IT IS PROPOSED, pursuant to the authority contained in Sections 4 and 303 of the Communications Act of 1934, as amended, that Part 73 of the Commission's Rules be AMENDED as set forth in the attached appendix.

31. For further information regarding this proceeding, contact Kathryn S. Hosford or Michael A. Lewis, Mass Media Bureau, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

It is proposed to amend Title 47 CFR Part 73 as follows:

1. The authority citation for Part 73 would continue to read as follows: Authority: 47 U.S.C. 154 and 303.

2. 47 CFR 73.206, Classes of stations and permissible channels, would be removed in its entirety. (The remaining requirements would be merged into Section 73.211.)

3. 47 CFR 73.207, Minimum distance separation between stations, would be amended by revising the fourth column of TABLE A entitled "10.6/10.8 MHz" which follows paragraph (b)(1) to read as follows. (Columns entitled Co-channel, 200 kHz, and 400/600 kHz would remain the same.)

TABLE A – MINIMUM DISTANCE SEPARATION REQUIREMENTS IN KILOMETERS (MILES)

Relation	*Co-channel*	*200 kHz*	*400/600 kHz*	*10.6/10.8 MHz*
A to A	(no changes to these columns)			8 (5)
A to B1				12 (7)
A to B				16 (10)
A to C2				15 (9)
A to C1				23 (14)
A to C				32 (20)
B1 to B1				15 (9)
B1 to B				18 (11)
B1 to C2				18 (11)
B1 to C1				26 (16)
B1 to c1				34 (21)
B to B				24 (15)
B to C2				22 (14)
B to C1				29 (18)
B to C				40 (25)
C2 to C2				22 (14)
C2 to C1				29 (18)
C2 to C				37 (23)
C1 to C1				37 (23)
C1 to C				45 (28)
C to C				48 (30)

4. 47 CFR 73.208, would be amended by revising the equations in paragraphs (c)(3) and (4) to read as follows:

Section 73.208 Reference points and distance computations.

* * * * *

(c) * * *

* * * * *

(3) * * *

$LAT_k = 111.13209 - 0.56605 \cos(2LAT_m) + 0.00120 \cos(4LAT_m)$

(4) * * *

$LONG_k = 111.41513 \cos(LAT_m) - 0.09455 \cos(3LAT_m + 0.00012 \cos(5LAT_m)$

* * * * *

5. 47 CFR 73.211, Power and antenna height requirements, would be revised in its entirety, including its headnote, to read as follows:

Section 73.211 Classes of stations; power and antenna height requirements.

(a) The rules applicable to a particular station, including minimum distance separations and maximum facility requirements, are determined by its class. The class permitted must conform with that designated in the Table of FM Allotments (see Section 73.202). Stations designated as Class A, B1, and B may be authorized in Zones I and I-A. Classes A, C2, C1, and C may be authorized in Zone II.

(b) The minimum permitted effective radiated power is 0.1 kW. A station's power, index, or power/height combination must exceed the maximum of the next

lower class for its zone of operation.

(c) The maximum effective radiated power (ERP) in any direction, the height above average terrain (HAAT) associated with those values of ERP, and the maximum index for the various classes of stations are listed below. Other combinations of ERP and HAAT are permitted if the ERP is less than the maximum and the maximum index is not exceeded.

		Maximums	
Class	*ERP*	*HAAT*	*Index*
A	3 kW	100 meters	52
B1	25 kW	100 meters	60
B	50 kW	150 meters	68
C2	50 kW	150 meters	68
C1	100 kW	299 meters	77
C	100 kW	600 meters	85

(d) The station index is determining using the following formula. When an antenna height is less than 30 meters, a minimum of 30 meters must be assumed.

$$I = 10 \log P + 23 \log H$$

Where: I = index rounded to nearest whole number,
P = effective radiated power in kilowatts, and
H = antenna height above average terrain in meters.

(e) In Puerto rico and the Virgin Islands, the following maximums can be used as an option to those specified in paragraph (c) of this section. Other combinations of ERP and HAAT are permitted, if the ERP of the Class B1 and B station do not exceed 25 and 50 kW, respectively, and the index does not exceed it maximum.

		Maximums	
Class	*ERP*	*HAAT*	*Index*
A	3 kW	335 meters	63
B1	5 kW	335 meters	65
B	25.5 kW	600 meters	79

(f) Stations authorized prior to March 1, 1984, with facilities in excess of those specified for station Classes A, B or C in this section may continue to operate as authorized. Changes to these stations would be permitted if they do not increase their effective radiated powers or extend their 1 mV/m field strength contour beyond their present authorization.

NOTE: Authorized stations that do not conform to the requirements of this section, may continue as authorized until March 1, 1987. Thereupon, stations will be classified in accordance with the provisions of this section reflecting their authorized, or applied for, facilities.

6. 47 CFR 73.213, Stations at spacings below the minimum separations, would be revised in its entirety to read as follows:

Section 73.213 Stations at spacings below the minimum separations.

Stations authorized prior to November 16, 1964, at locations that do not meet the minimum distances specified in Section 73.207, may continue to operate as authorized. Changes to these stations would be permitted if they do not increase

their effective radiated power or extend their 1 mV/m field strength contour beyond their present authorization.

7. 47 CFR 73.313, would be amended by revising paragraph (c)(2) to read as follows:

Section 73.313 Prediction of coverage.

* * * * *

(c) * * *

(1) * * *

(2) To use the chart for other purposes, the ordinate scale should be converted by the appropriate adjustment in dB. For example, the ordinate scale for a power of 50 kW (17 dB above 1 kW) should be adjusted by 17 dB and, therefore, a field strength of 40 dBu would be converted to 57 dBu. In predicting the distance to the field strength contours, the effective radiated power to be used is the maximum ERP of the main radiated lobe regardless of orientation, in the pertinent direction. In predicting other field strengths over areas not in horizontal plane, the effective radiated power to be used is the power in the direction of such areas; the appropriate vertical plane radiation pattern must, of course, be considered in determining this power.

* * * * *

8. 47 CFR 73.1030, Notifications concerning interference to radio astronomy research, and receiving installations; would be amended by revising the phase "(in the vicinity of coordinates 40′07′50″ N Latitude, 105′14′40″ W Longitude)" of paragraph (b) to read "(within the area bounded by 40′09′10″ N on the north, 105′13′31″ W on the east, 40′07′05″ N on the south, and 105′15′13″ W on the west)".

9. 47 CFR 73.1690, would be amended by revising paragraph (c)(1) to read as follows:

Section 73.1690 Modification of transmission systems.

* * * * *

(c) * * *

(1) Replacement of a non-directional antenna with one of the same or different type or number of bays, provided that the height above ground of the center of radiation is within +/- 2 meters of that specified in the station authorization, the parameters are within that permitted by its class designation, and there is no change in the maximum effective radiated power.

* * * * *

Comparative Coverage Preference, Slight-to-Moderate
Control, Transfer of
Ownership and Management, Integration

Review Board affirms *I.D.* grant of television application; winner received 100% "integration" credit for fulltime participation of its sole "general" partner (10% equity owner). There was no evidence of "sham" because "general" partner had "incomparably distinguished career" in broadcasting and minority group members (including "general" partner) owned 60% of applicant's total equity. Board withholds affirmation of 50% "integration" credit to loser — who had impermissibly amended on "B" cut-off date to add new "general" partner and thereby effect a transfer of voting control, and withdrawn that amendment and re-amended to specify a 33-1/3% transfer — because applicant's intentions as to its "integration" proposal remained unclear and nonspecific. Resulting substantial "integration" preference outweighed *I.D.* — awarded slight-to-moderate comparative coverage preference.
—*Independent Masters, Ltd.*
MM Docket No. 83-1246

FCC 86R-33

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
INDEPENDENT MASTERS, LTD. Augusta, Georgia	MM Docket No. 83-1246 File No. BPCT-830701KF
AUGUSTA 54 BROADCASTING COMPANY Augusta, Georgia	MM Docket No. 83-1251 File No. BPCT-830705KI
For Construction Permit	

Appearances

Seymour M. Chase and *Robert A. Zauner* on behalf of Independent Masters, Ltd.; and *R. Clark Wadlow*, *Jane D. Woodfin*, and *Reed Rubinstein*, on behalf of Augusta 54 Broadcasting Company.

DECISION

Adopted: May 20, 1986; Released: May 23, 1986.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER BLUMENTHAL:

1. This proceeding involves the mutually exclusive applications of Independent Masters, Ltd. (IML) and Augusta 54 Broadcasting Company (Augusta 54) for authority to construct a new commercial UHF television station on Channel 54 at Augusta, Georgia.[1] By *Hearing Designation Order (HDO)*, 48 Fed. Reg. 54119, published November 30, 1983 these applications (along with six other applications subsequently dismissed) were designated for consolidated hearing on the standard comparative issue, including a comparison of the applicants' respective coverage of areas and populations. In an *Initial Decision (I.D.)*, FCC 85D-62, released October 3, 1985, presiding Administrative Law Judge (ALJ) Edward Luton granted the Augusta 54 application after concluding that the superiority of its 100% ownership "integration" proposal over IML's 50% proposal decisionally outweighed IML's slight-to-moderate comparative coverage preference. This proceeding is now before the Review Board on exceptions filed by the parties. We now have reviewed the *I.D.* in light of the exceptions and reply briefs, the oral argument held February 21, 1986, and the underlying record. We adopt the general findings of fact and conclusions of law, except as modified herein with respect to IML's "integration" proposal, and affirm the ALJ's ultimate conclusion that a grant of the Augusta 54 application will best serve the public interest, at the same time inviting Commission

[1] Pursuant to the Board's suggestion at oral argument, the two remaining parties discussed a possible amicable settlement of this case. However, by Report on Status of Settlement Negotiations, filed on April 4, 1986 by counsel for Augusta 54, the Board was advised that "settlement does not appear possible." Having deferred consideration of the case until the filing of that Report, the Board then took up consideration of the merits.

review of certain policy questions discussed in the text below.

2. The touchstone for this case is the *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965) ("*Policy Statement*"). As will be seen from our discussion of the Commission's most recent decision in *Daytona Broadcasting Co., Inc., infra* para. 9 and note 13, Augusta 54's exception relating to the husband of one of IML's "limited" partner principals has been mooted as to the *Policy Statement's* comparative criterion of diversification of control of the media. Furthermore, in light of the fact that the only matter of decisional import in this proceeding centers on the *Policy Statement's* criterion of integration of ownership with station management, and more specifically the quantitative credit due the respective applicants thereunder, our review will focus on the "integration" issues.

3. *Integration Proposal of IML.* In its application, as originally filed on July 1, 1983, IML listed its principals as Henry Preston Elliott, "general" partner and 20% equity owner, and Shirley L. Hook, "limited" partner and 80% equity owner. On August 23, 1983, the "B" cut-off date[2] in this proceeding, IML filed an application amendment which, though maintaining Mr. Elliott as a "general" partner and 20% equity owner, added Juanita Parks as a new "general" partner and 10% equity owner. It also decreased the equity interest of Ms. Hooks, the "limited" partner, to 70%. IML did not indicate in its August 23 amendment whether the two "general" partners would "vote" in proportion to their equity interests or would, instead, have co-equal "voting" power. However, during the April 18, 1984 deposition testimony of its two "general" partners, Elliott and Parks, IML's principals revealed explicitly for the first time that they intended to share *equal* "voting" power, despite the 2-to-1 disparity in their equity interests (*i.e.*, 20%/10%). *Memorandum Opinion and Order,* FCC 84M-3914, released September 13, 1984, at para. 4.[3] On May 4, 1984 (eight days after Augusta 54's counsel states that they received a copy of the deposition transcript), Augusta 54 filed a Motion to Dismiss or, Alternatively, to Enlarge the Issues

[2] The "B" cut-off date is the date by which mutually exclusive broadcast applications may be amended as a matter of right prior to designation for hearing and is specified in the Commission's Public Notice announcing the acceptance for filing of the last-filed mutually exclusive application. 47 CFR § 73.3522(a)(2). *But see* 47 CFR § 73.3572(b) relating to "major" changes in ownership in filed applications, and our discussion thereof *infra* at paras. 4–5.

[3] That MO&O found that the IML partnership agreement "does not apportion control between its two general partners," but plainly "envisions" that they will "share control of the partnership equally. The deposition testimony . . . confirms the correctness of this view." *Id.*

against IML.[4] Four days after that, on May 8, Elliott and Parks reaffirmed at hearing that, in fact, they indeed intended to share *co-equal* "voting" power in IML's management. Tr. 63 (Parks), 108 (Elliott).

4. By *Memorandum Opinion and Order*, FCC 84M-3914, *supra*, the ALJ found that the August 23, 1983 amendment specifying the belated entry of Ms. Parks as a "general" partner having *equal* "voting" power with the one prior "general" partner caused an *effective* transfer of 50% *control* of IML from the previous sole "general" partner, Elliott, to Ms. Parks. Under the then-prevailing version of Section 73.3572(b) of the Commission's Rules, 47 CFR § 73.3572(b) (1983), the IML application could have been summarily dismissed from the hearing as constituting a "major" change in its application as filed, and returned to the agency's processing line for assignment of a new file number, thereby losing the right to be comparatively considered against the Augusta 54 application. *See Tequesta Television, Inc.*, FCC 86R-22, released April 11, 1986.[5] However, relying on *Redwood Televisions Ministries, Inc.*, 52 RR 2d 1365 (1982), the ALJ granted IMl a final opportunity to withdraw its offending "major" amendment or face dismissal. FCC 84M-3914, *supra*, at para. 6. On September 25, 1984, IML withdrew that offending amendment; *but*, three days later, it filed a Petition for Leave to Amend to report that Ms. Parks would remain as "general"

[4] Augusta 54 Reply at 9.

[5] As we recently stated in *Tequesta Television*, *supra*:

> Under the former version of Section 73.3572(b) of the Rules, 47 CFR § 73.3572(b) (1983) [which is applicable to the IML application here], an ownership amendment was classified as "major," requiring return of the application to the processing line for assignment of a new file number and republication of public notice, if the ownership change "would require the filing of an application therefor on FCC Form ... 315 [the long form applicable to transfers of control]." First Report and Order, *Processing of Broadcast Applications*, 56 RR 2d 941, 945 (1984). Under former Section 73.3572(b), a transfer of control was deemed to occur whenever (1) 50% or more of the voting power of an applicant was being transferred and (2) as a result of the transfer, 50% or more of the voting power would be held by a person, or persons, whose qualifications had not been "passed upon" in a so-called "long form" application. *See Grace Missionary Baptist Church*, 80 FCC 2d 330, 336 (1980). Further, it is well-settled that the Commission will disregard the interests of passive limited partners, who have no actual authority to participate in the management of the applicant, in determining whether a transfer of control has occurred. *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488 (1981).

Id., at para. 5. Indeed, even the application of the revised, current version of Section 73.3572(b) to IML's application would not alter the result. *Id.*, at para. 6.

partner with a 10% equity interest, and that the IML partnership agreement had been now formally amended, this time to require that the "general" partners (Elliott and Parks) "vote" only *in proportion* to their equity ownership and *not* as co-equals. *Memorandum Opinion and Order*, FCC 85M-273, released January 17, 1985, at paras. 4-5. Had that 1984 amendment been permissible, IML's claim for "integration" credit would have been an *effective* 66-2/3% (*i.e.*, Elliott as "general" partner with two-thirds "voting" power; Parks now regarded as entering applicant after "B" cut-off date and inelgible for "integration" credit). However, IML's September 28, 1984 amendment was accepted by the ALJ "for reporting purposes only," FCC 85M-273, *supra*, at para. 11, and it thus confined IML's ownership "integration" credit to a potential 50% maximum (*i.e.*, no comparative credit awarded for post "B" cut-off "upgrading" of Elliott's "voting" power beyond 50%). *See I.D.*, paras. 4-8. That ruling was correct; IML made no "good cause" showing. 47 CFR § 73.3522.

5. In its exceptions, IML argues that the ALJ exceeded his authority when he ruled that IML had to withdraw its August 23, 1983 amendment reporting the addition of Ms. Parks as a "general" partner, or face dismissal from the hearing, because the ALJ's order amounted to an impermissible reconsideration of the *Hearing Designation Order*.[6] Reversal of the ALJ's September 13, 1984 ruling, in IML's view, will entitle it to revert to its withdrawn ownership structure (contemplating the sharing of *equal* "voting" by the two "general" partners), and to receive an effective 100% "integration" credit. In addition, IML claims that under either the new or old version of Section 73.3572(b) of the Rules, the ALJ erred in finding that the addition of Parks as a "general" partner with "voting" power equal to that of Elliott, the other "general" partner, constituted an impermissible transfer of control.[7] While we thoroughly agree with the ALJ that, based on the 1984 testimony of Parks and Elliott (Tr. 63, 108), the August 23 IML amendment (as understood by its principals) constituted an impermissible transfer of 50% of IML's "voting" control, *see Grace Missionary Baptist Church*, 80 FCC 2d 330 (1980); *Tequesta Television*, *supra*, we are consequently confronted

[6] IML Exceptions at 4-7. This claim is frivolous, since it was not until a 1984 deposition and hearing that it was revealed that the new 10% "general" partner, Parks, and the existing 20% "general" partner, Elliott, each claimed an *effective* 50% control of IML. Thus, the 1983 *Hearing Designation Order* could not have anticipated this latent "major" amendment revelation.

[7] *Id.*, at 7-18.

in IML's exceptions with the question of how much "integration" credit to actually award IML. First, we certainly will not award IML 100% "integration" credit. Although IML's two "general" partners, Elliott and Parks, were from the "B" cut-off date onward proposed for fulltime "integration," a 100% "integration" award would completely ignore IML's untimely transfer of a purported 50% "voting" control to Parks. If we accept as true (*arguendo*) the testimony of Parks and Elliott that, as of the "B" cut-off date, they each were thought to have *equal* "voting" power in IML, then the ALJ was indisputably correct in recognizing that IML could be awarded no more than a 50% "integration" credit, based upon Elliott's yielding up 50% of his hitherto 100% "voting" power to Parks. However, even if we disregard the 1984 testimony IML's "general" partners, and instead consider Elliott as having a 662/3% "vote" (based on IML's September 28, 1984 amendment "upgrading" its position by claiming that "voting" power would be exercised by the "general" partners only *in proportion* to their equity interests), then we could award IML no more than 66-2/3% "integration" credit. Under this scenario, all "integration" credit for Parks would be disallowed; and her entry as only a 33-1/3% "limited" partner would not have constituted a "major" change in ownership under Section 73.3572(b) (*i.e.*, not a 50% *effective* change).

6. At oral argument before the Board, the following discussion occurred in an effort to clarify IML's position, in view of the sequence of ownership amendments discussed above, as to precisely how much "integration" credit it should actually receive[8]:

> [Board Question]: Mr. Chase, you are going to have to decide, you being the attorney, which theory you want to propound here before the Board. This is not a smorgasbord in which you say I've got one theory in which I get 66-2/3's percent for the integration of Mr. Elliott and 33-1/3 percent of integration for Ms. Parks, or on a different theory I'm entitled to the 50-percent integration for Mr. Elliott, or C) I'm entitled to 100 percent, because I herewith now and forever more withdraw the amendment that caused all the confusion both with the Judge and with my own principals.
>
> [IML Counsel]: I see.
>
> [Board Question]: You put us in a position where you say this is a multiple-choice application, and I dno't want to have to make that choice.
>
> [IML Counsel]: The reasoning you have provided is very persuasive. I'm a little hesitant to do something immediately, because I'd like an opportunity to reflect on it. May I have leave to take such position within a given

[8] Tr. of Oral Arg. of February 21, 1986 at 338–339.

time, within two or three weeks?

7. In view of our recent decision in *Tequesta Television, supra,* we might very well hold that, as soon it appeared to the ALJ that IML had effectively transferred 50% of a sole "general" partner's putative controlling interest in its entity, IML's application should have been dismissed pusuant to the former Section 73.3572(b) of the rules.[9] Even so, it is glaringly apparent from this record that IML did not, and still does not, "have its act together" insofar as its intentions relating to the basic question of *who* has (or had) *what* controlling or "voting" ownership interest in the management structure of its entity.[10] Depending on which IML ownership "structure" one accepts as representing the *true* "integration" profile IML projects, it might be entitled to credit for integrating equity owners having active management control over the proposed station in alternative factors of 100%, 66-2/3%, or 50%. It all depends on which amendment is considered operative, and/or whether the 1984 testimony of the two "general" partners as to their *co-equal* 50% "voting" power is to be believed.[11] At this point, who can tell what IML truly intended, or intends, as its earnest "integration" position?

8. Under these circumstances, we will not make the selection for IML, and we well withhold affirmation of the 50% credit awarded by the ALJ. At some time in the licensing process, an applicant must know and undersatand the nature and legal impact of its actual "integration" proposal. That is, *which* of its principals will have *what* percentage of the controlling voice in the proposed station's operation. Although the ALJ's application of a 50% "integration" factor was, by his reasoning on the

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[9] However, Augusta 54 does not directly argue that proposition here (*see* Exceptions at 34 *et seq.*). It argues only that IML did not obey the ALJ's September 13, 1984 order to withdraw its August 23, 1983 amendment, or face dismissal. As is apparent from the cited oral argument discussion, it is not clear whether IML considers the offending amendment as "withdrawn." For reasons which follow from our discussion *infra,* we need not ponder this question.

[10] We quickly dismiss IML's specious argument that the belated insertion of a new "general" partner later claiming 50% "voting" control over IML did not effect a "major" change in "ownership" covered under former Section 73.3572(b) on the grounds that "[t]he rule speaks of 'ownership', and not of voting or controlling interests . . . . " IML Exceptions at 9. As our discussion, *infra,* of *Anax Broadcasting, Ownership Attribution,* and kindred decisions makes crystal clear, it is primarily — if not *exclusively* — on voting or controlling interests that the Commission has *always* focused, under the old version of the rule or the new. Suffice it here to say that we agree entirely with Augusta 54's Reply at 3-8 on this matter. *See also Tequesta Television, supra.*

[11] For obvious reasons, IML does not dispute the 1984 testimony of its own "general" partners.

amendments, theoretically correct by virtue of the legal operation of our "amendment" and "anti-upgrading" principles, it is obvious here that his award of a 50% integration credit to IML rested upon operation of law, and nowhere upon the conscious (or unconscious) intentions of the IML applicant itself. Even now, IML's actual "integration" structure is more a matter of abstract legal inter-play and the gamesmanship of advocacy than upon the timely understanding or intent of the applicant. We decline to play.[12]

9. *Integration Proposal of Augusta 54.* The ownership structure proposed by Augusta 54 is set forth at *I.D.*, para. 17, and reflects:

Name	*Position*	*Equity Interest*
Dr. Howard A. Myrick	Managing General Partner	10%
Felker W. Ward, Jr.	Limited Partner	40%
Randall L. Rader	Limited Partner	40%
Norma Crowder	Limited Partner	10%

Stemming from a seed corn first planted in *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981), the Commission has evolved a policy which generally holds that "limited" partners are no more than "passive investors" whose equity interests are not to be a factor in analysing most ownership or control aspects of the regulation of electronic media entities. Thus, cross-pollinating from *Anax*, the Commission sought to assist minority group entry into broadcasting by holding that it would extend its "tax certificate" and "distress sale" policies by allowing the "limited" partnership device to supersede its former eligibility requirement that minority group ownership of a station's assignee hold more than 50% of the overall equity in a station. *See Minority Ownership in Broadcasting*, 92 FCC 2d 849, 853-855 (1982), *proceeding terminated*, 99 FCC 2d 1249 (1985) ("*Minority Ownership*"). Similarly, in revising its rules relating to its fundamental limitations on national media ownership and the attribution of such ownership, the Commission, citing *Anax*, determined that *bona fide* "limited" partners were not to be counted or recognized under our national media ownership limits (and derivative policies), since they are

[12] *See, e.g.*, IML Exceptions at 4-18. Because we hereinbelow affirm the ALJ's award of a 100% "integration" credit to Augusta 54 (subject to Commission review), IML would not prevail even if we affirmed the ALJ's award of a 50% credit to it, or even raised it to 66-2/3%. In light thereof, we need not rule on Augusta 54's charges of misrepresentation against IML. From the record, it appears that the IML principals were more confused about its "integration" proposal than conniving.

perceived as having insufficient operational *control* of a partnership entity. *See Attribution of Ownership Interests*, 97 FCC 2d 997, 1022-1023 (1984), *reconsideration*, 58 RR 2d 604 (1985) ("*Ownership Attribution*").[13] And, most recently, the Commission clarified its *Ownership Attribution*, modifying slightly *Cleveland Television Corp.* (*supra* note 13), in the process, by holding that *bona fide* "limited" partnership interests are to be completely non-cognizable in comparative broadcast licensing proceedings. *Daytona Broadcasting Co., Inc.*, FCC 86-182, released April 18, 1986, para. 7, *denying reconsideration and reaffirming* 97 FCC 2d 212 (Rev. Bd. 1984).

10. While accepting the "limited" partnership device as a means of creating non-cognizable media interests, the Commission fully apprehended that the device was inherently subject to easy abuse in that parties denominated as "limited" partners could, in practice, exercise the prerogatives of *de facto* control, *unless* regulatory safeguards ensured the true functional "passivity" of such "limited" investors. Hence, to help assure that those parties seeking the special inducements of the Commission's "tax certificate" and "distress sale" policies not use the "limited" partnership device to construct "sham" arrangements in which non-minority group equity owners hold the actual *de facto* control, the Commission demanded that — at a minimum — minority group owners held out as "general" partners also hold *no less* than a 20% *total* equity ownership in the entity acquiring the broadcast license. *Minority Ownership*, *supra*, 92 FCC 2d at 855.[14] Further, upon reconsideration of its *Ownership Attribution* decision declaring *bona fide* "limited" partnership holdings to be non-cognizable media ownership interests, the Commission expressly overruled its prior view that partnership agreements in consonance with the Uniform Limited Partnership Act ("ULPA") sufficiently insulated the "general" partner(s) from potential "limited" partner influence or control. Finding the ULPA to be wholly inadequate in many vital respects, the Commission's reconsideration order established many additional requirements for insulative partnership provi-

[13] The concept that the ownership interests of "passive investors" were non-cognizable for certain substantive Commission purposes was by no means novel. *See, e.g., Evening Star Broadcasting Co.*, 67 FCC 2d 318, 324 (1978) (preferred (*i.e.*, non-voting) stockholders' interests not cognizable); *Cleveland Television Corp.*, 91 FCC 2d 1129, 1131-1135, 1139 (Rev. Bd. 1982) (equity interests of preferred stockholders given little adverse weight in considering comparative "diversification" merits), *review denied*, FCC 83-235, released May 18, 1983 (Comm'n), *aff'd*, 732 F.2d 962 (D.C. Cir. 1984).

[14] That 20% *minimum* equity ownership requirement was pointedly noticed in a recent Board case. *Tequesta Television, Inc., supra* para. 4 (separate statement).

sions over-and-above those set forth in the ULPA. *See Ownership Attribution, supra*, 58 RR 2d at 609-611, 615-620. And, finally, the Commission's recent reconsideration order in *Daytona Broadcasting Co., Inc., supra*, makes clear that the insulative safeguards relating to "limited" partnership structures established in its *Ownership Attribution* reconsideration order are mandatory as well in the setting of comparative licensing cases, lest the equity interests of putative "limited" partners face the consequences of being considered as cognizable ownership interests. *See Daytona Broadcasting*, FCC 86-182, *supra*, at para. 7 & n. 6.

11. With that background in mind, we review IML's exceptions to the fact that the ALJ accepted Augusta 54's "limited" partnership structure and extrapolated Dr. Howard Myrick's 10% "general" partnership interest into an effective 100% fulltime ownership/management integration credit, *I.D.*, paras. 38 *et seq.*, a comparative credit that caused Augusta 54 to prevail. *See id.*, para. 47.[15] Relying chiefly on *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd in part and reversed in part*, 102 FCC 2d 288 (1985), *appeal pending sub nom. United American Telecasters, Inc. v. FCC*, Nos. 85-1663, *et al.* (D.C. Cir. filed October 15, 1985), IML attacks the *bona fides* of Augusta 54's "limited" partnership arrangement and seeks reversal of Dr. Myrick's (effective) 100% "integration" credit. IML asserts (1) "that Dr. Myrick's total investment in Augusta 54 consists of a token payment of $10 . . . "[16]; (2) that Dr. Myrick has been contractually relieved of certain of the financial responsibilities indicative of a true "general" partner[17]; and (3) that the entire Augusta 54 entity was formed by a merger with a prior applicant having ties with a consulting firm whose functions and purposes have been closely scrutinized by the Board.[18] Finally, it asserts that the Augusta 54 partner-

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[15] Holding that Dr. Myrick is the sole "general" partner of Augusta 54 (*see supra* para. 9), and applying the dynamics of the *Anax* principle which exclude "limited" partnership interests from "integration" calculations, the ALJ awarded Augusta 54 the 100% "integration" credit factor.

[16] IML Exceptions at 19.

[17] IML Exceptions at 20 refer specifically to a clause in August 54's partnership agreement, which — in part — provides:

> However, the provisions of this Paragraph shall not be construed to require the General Partner to provide funds to or on behalf of the Partnership in excess of the amounts to which he has specifically agreed under the provisions of this Agreement. The General Partner may pay all Partnership obligations with respect to which the General Partner has full potential liability before paying any Partnership obligations which are, by their terms, limited to recourse against specific properties.

[18] *See Channel 63, Inc.*, 57 RR 2d 1597 (Rev. Bd. 1985) (separate statement). In that statement, the Board raised questions about the *bona fides* of a number of

ship agreement permits that the "limited" partners can remove Dr. Myrick, at will, by merely requiring him in writing to resign.[19]

12. Although we agree with IML that several aspects of the Augusta 54 partnership structure give rise to heightened concern, and have caused us to review exceedingly closely its partnership agreement as well as Dr. Myrick's minor investment and equity interests, we believe that — subject to modification by the Commission and clarification of its "limited" partnership policies in certain respects — the current law constrains us to credit Augusta 54 with the 100% effective "integration" factor awarded by the ALJ. First, as to Dr. Myrick's token $10 payment for his 10% equity interest in Augusta 54, we think this fact alone insufficient to discredit Dr. Myrick's putative position as Augusta 54's sole managing "general" partner. Apart from the fact that it was expressly to assist minority group individuals to obtain the financial backing of "passive" investors that the Commission exhorted the "limited" partnership device in its *Minority Ownership* proceedings, *see* 92 FCC 2d at 853-855,[20] both the Board and the Commission have held that an immediate financial investment is not the *sine qua non* when examining the *bona fides* of a proposed ownership interest. *See, e.g. KIST Corp., supra*, 102 FCC 2d at 290 & n. 5. As we explained in *KIST*, financial leverage can be an indicator of *de facto* control, *see* 99 FCC 2d at 186-187, 190,[21] but other attendant factors must be considered as well. *See, e.g., Caldwell Broadcasting Corp.*, FCC 86-245, released May 15, 1986 (Comm'n) at paras. 4-6, *aff'g* 100 FCC 2d 115 (Rev. Bd. 1985) (aff'g ALJ's finding of sham ownership and "integration" structure). Moreover, Dr. Myrick's token $10 capital contribution becomes less significant in view of the fact that it is claimed — without refutation — that "Augusta 54's partnership agreement required a total capital contribution from all partners of only $100."[22]

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broadcast applications "arranged" by a particular Tennessee consulting firm. We have since scanned such applications very carefully.

[19] IML Exceptions at 24, citing Section 11(i)(1) of Augusta 54's partnership agreement.

[20] Dr. Myrick is a black male. *I.D.*, para. 18.

[21] Both the Commission and the court long-ago recognized that even a mere creditor's financial leverage, if applied against a licensee, can effect *de facto* control. *See WLOX Broadcasting Co.* v. *FCC*, 260 F.2d 712 (D.C Cir. 1958).

[22] Augusta 54 Reply at 15. However, we concede that this assertion, though perhaps technically true, is partially irrelevant. We presume that many thousands have been spent thus far in prosecuting Augusta 54's application, and that additional financial contributions have been made by *someone* since that time.

13. As to the Augusta 54 partnership clause relating the "general" partner's liability about which IML repines, *see supra* note 17, we find that the language, while obtuse, does not appear on its face to relieve Dr. Myrick of a "general" partner's usual personal liability for the debts of a "limited" partnership entity.[23] The clause seems merely to arrange a priority of certain liabilities. Indeed, in *KIST Corp.*, the Board noted "savings clauses" it found far more favorable to an alleged "general" partner's financial liabilities, *see* 99 FCC 2d at 189-191, but the Commission reversed the Board's refusal to credit that "general" partner's status as such. *See* 102 FCC 2d at 290-292. Hence, the disputed Augusta 54 partnership liability clause is not persuasive evidence of the lack of Dr. Myrick's status as a *bona fide* "general" partner. Nor is the provision in the Augusta 54 agreement permitting the qualified right of the "limited" partners to remove Dr. Myrick a fatal flaw under the law to be applied in this current case. Augusta 54 accurately notes that, under its partnership agreement, Dr. Myrick can be removed only for a "material default" in his compliance with the partnership agreement,[24] and we believe that this condition provides some reasonable assurance that Dr. Myrick cannot be summarily or arbitrarily removed by that entity's three "limited" partners.[25] With respect to IML's complaint that Augusta 54 was created by a merger of two former competing applicants, including one applicant assisted by a consulting firm whose activities have been held to close scrutiny by the Board,[26] we note that the two former principals of

[23] Under the general tenets of law, a "limited" partner's future liability for the obligations of an enterprise are limited by the amount of that partner's specific contribution, while a "general" partner is "personally liable for the partnership debts." *Minority Ownership*, 92 FCC 2d at 854.

[24] Augusta 54 Reply at 18 (citing IML Exh. 6, p. 22).

[25] We realize that, upon reconsideration, the Commission's *Ownership Attribution* policies were significantly strengthened with respect to the protection of "general" partners from a removal vote by the "limited" partners. *See* 58 RR 2d at 619-620. And, further, that the Commission's recent decision upon reconsideration of *Daytona Broadcasting*, *supra* para. 9, has declared that the strengthened standards of its *Ownership Attribution* rules would apply, *in futuro*, to "general" / "limited" partnerships proposed in the comparative licensing context. *See* FCC 86-182, released April 18, 1986, at para. 7 & n. 6. However, we notice that Augusta 54's "limited"/"general" partnership agreement was formed considerably before the Commission strengthened its relevant removal standards; and *Daytona Broadcasting* expressly announces that the strengthened standards are to be applied *prospectively. See id.* In the absence of other compelling indicia which would cumulatively undermine the *bona fides* or the efficacy of its "limited" partnership, this aspect of the Augusta 54 agreement is not critical here.

[26] *See supra* note 18.

the dismissing applicant (Augusta Family) are here proposed only as "limited" partners.[27] Since the interests of *bona fide* "limited" partners do not affect the comparative profile of an applicant in any way, *Anax*, *supra*, no "upgrading" of Augusta 54's position *vis-a-vis* IML has occurred. *Compare Daytona Broadcasting*, *supra* (applicant denied comparative credit for "upgraded" status of merged applicant). Here, Augusta 54 has always proposed 100% fulltime ownership/management "integration" credit,[28] albeit with a different pre-merger organizational structure.

14. We believe that IML's exceptions are, so far as they go, insufficient withal to uproot the Augusta 54 "integration" award made by the ALJ. And yet, in addition to the various individual points raised by IML, its aggregated arguments in this case implicitly raise the unavoidable question of whether a "general" partner holding a mere 10% equity interest in an entity can then extrapolate that fractional equity interest into an *effective* 100% comparative "integration" credit (along with the concomitant weight of any enhancing merit for such as minority ownership, *etc.*). It will be recalled from our discussion in para. 10, *supra*, that even in an extraordinary attempt to facilitate minority group ownership of broadcast stations through acceptance of the "limited" partnership device as a financial assistance tool, the Commissions' *Minority Ownership* policy statement required that — in lieu of its prior "more than 50%" racial minority ownership standard for "tax certificate" and "distress sale" eligibility — applicants seeking the presumption of *de facto* control by the "general" partner(s) meet a strict minimum standard. That is, where a "limited"/"general" partnership agreement is involved, the minority group "general" partner(s) must hold, at the very least, a 20% overall equity interest in the entity "to ensure that complete managerial control over the station's operations is reposed in the . . . general partner(s)." *Id.*, 92 FCC 2d at 855. In the case at bar, Augusta 54 seeks the presumption of full operational control of its proposed broadcast station by a single "general" partner holding a mere 10% equity interest in the applicant entity; or, only *half* the actual equity interest the Commission demands as a minimum of "general" partners in *Minority Ownership* to help assure true and actual "general"

[27] The two principals of Augusta 54 formerly associated with the dismissing applicant, Augusta Family, Randall L. Rader and Norma Crowder, appear again in the post-merger applicant as 40% and 10% "limited" partners. IML Exceptions at 26.

[28] *See* Augusta 54 Reply at 19-22.

partnership control of the station.

15. When the foregoing matter was raised at oral argument before the Board, Augusta 54 counsel responded that in *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583 (Rev. Bd. 1982) (majority opinion),[29] the Board awarded 100% fulltime "integration" credit to an entity wherein the "general" partner held only a 1% *de jure* equity interest in that prevailing entity. *See id.*, 90 FCC 2d at 585.[30] However, it appears that the *Central Texas* Board also found there that the 1% "general" partner had, under the operation of a trust agreement covering the remaining 99% equity, "complete authority and responsibility for all management functions of the partnership." *Id.*[31] No such trust or other agreement such as that interposed in *Central Texas* is present here, Augusta 54 relies for its 100% "integration" claim solely on the fact that the 10% principal is the solitary "general" partner.

16. Notwithstanding the foregoing, and expressing an invitation of the Commission's review of this important question of how small a "general" partner's equity may be in such cases, we will here affirm the 100% "integration" credit awarded to Augusta 54. We do so (noting our invitation of Commission review) only because certain critical facts in this case make it less likely that the Augusta 54 "limited" partnership arrangement at issue here will permit, or was intended to permit, the "limited" partners of Augusta 54 to effect a sham. First, as Augusta 54 points out, minority group members *do* here own "60% of the total equity in the applicant." *See I.D.*, paras. 17 and 31.[32] Hence, we are not here faced with the possibility of a non-minority group controlled applicant attempting a structural ownerhship maneuver designed

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[29] *Reconsideration denied*, 92 FCC 2d 914, *review denied*, FCC 83-415, released September 21, 1983, *aff'd mem. sub nom. Blake-Potash Corp.* v. *FCC*, No. 83-2112 (D.C. Cir. filed April 26, 1985).

[30] *See* Tr. of Oral Arg., *supra*, at 350-352.

[31] At oral argument, Augusta 54's counsel challenged the characterization of the crucial trust arrangement accepted by the Board in *Central Texas*. *See* Tr. of Oral Arg. at 351. However, this matter does not appear to have been directly argued in *Central Texas*. Moreover, to the extent that *Central Texas* may have too readily extrapolated that "limited" partner's 1% equity interest into a 100% "integration" credit, it is sufficient at this late date — even if Augusta 54 is correct about *Central Texas* — to lean on the excusatory judicial observation that "the matter does not appear to appear to us now as it appears to have appeared at the time." *See, e.g.*, *McGrath* v. *Kristensen*, 340 U.S. 162, 178 (1950) (Jackson, J., concurring).

[32] Augusta 54 Reply at 14. It also notes:

> At the time Augusta 54 filed its application, 100% of its equity was held by Black principals. Only after its settlement with Augusta Family was a 40% equity interest conveyed to its only non-minority ["limited"] partner. *Id.*, at n. 16.

solely to exploit our comparative processes in a disingenuous fashion. *Compare, e.g., KIST Corp., supra; cf. N.E.O. Broadcasting Co.*, FCC 86R-18, released April 4, 1986, at paras. 3-7 (husband falsely superimposes wife as true party-in-interest) (application for Comm'n review pending). And, second, Dr. Myrick's entire professional career has been in highly important broadcast management positions: He is currently the Chairman of Howard University's Radio, Television and Film Department, where he also supervises WHMM-TV (Channel 32), *I.D.*, paras. 20-21 prior thereto (1982-1983) he managed Clark College's radio station WCLK-FM, *id.*, para. 22; from 1977 to 1982 he was Associate Director, then Director, of Communications Research for the Corporation for Public Broadcasting, *id.*, para. 23; before that (1975-1977) he served as Director and General Manager of the American Forces Radio & Television Service, which serves as a network for more than 1,050 broadcast stations in 27 countries, *id.*, para. 24; and even before that (1973-1975), he served as Director and General Manager of the Armed Forces Korea Network, *id.*, para 25. *See also id.*, paras. 26-29 for additional highlights of Dr. Myrick's incomparably distinguished career in telecommunications. Indeed, it seems from the record that the merged Augusta 54 ownership model was structured specifically to attract Dr. Myrick to run that organization as a loose form of *quid pro quo* for the financial investments of the "limited" partners.[33] In view of these two very strong evidentiary factors, we will affirm — subject to Commission review — the extrapolated 100% "integratioon" credit awarded to Augusta 54.[34]

Conclusion

17. Not unlike many of our comparative licensing proceedings, this case turns on the respective credits to be awarded to the applicants under the *Policy Statement's* element of integration of *active* ownership interest with *active* management of the proposed

[33] The "limited" partnership structure is (or has been under the present tax laws) "an especially important financing device for station general managers and former broadcast executives who want to run their own stations." *Fifth Estate Financing: The Limits of Limited Partnerships*, BROADCASTING, January 27, 1986, at 113.

[34] In short, it was recently remarked that where the putative "general" partner(s) own, for example, less than 15% of the overall equity of an applicant, "we will begin to focus closely on the dog itself, and not the tail." *Tequesta Television, supra* (separate statement). Our close and lengthy review of Augusta 54's partnership arrangement seems to remove many questions as to whether Dr. Myrick will be, in fact, "Top Dog" should the station actually be built and operated as proposed. But not all.

station.[35] Further, in fact, this case is embedded deeply in what might fairly be called the arcania of the law and policy surrounding the question of whether, or to what extent, a particular applicant's "integration" proposal ought to be credited. In this case, and for the reasons explained in the preceding paragraph, we have affirmed the credit awarded by the ALJ to Augusta 54. *In dubio, pars mitior est sequenda.*[36] However, we have herein recommended that the basic question of whether it is proper or realistic to permit the extrapolation of a very minor equity interest (in this case 10%) into an effective 100% comparative "integration" factor, or whether some greater minimum equity level should be set before we will accept the problematical proposition that a very small equity owner will have total *de facto* control over a broadcast station, ought to be reviewed by the full Commission.[37] Until that time, we will continue our close case-by-case scrutiny to assure, as best we can, that valuable (and frequently dispositive) awards of comparative "integration" credit are fully supported by substantial evidence. Where the record evidence indicates a lack of *bona fides* as to a purported ownership structure, we will act accordingly. *See KIST Corp, supra; N.E.O., supra.*

18. As to IML, we will decline to affirm the *I.D.*'s grant of a 50% fulltime "integration" factor (a grant which IML itself protests as inaccurate). As indicated, an applicant's "integration" proposal should unambiguously reflect the genuine expectations and agreements of the applicant's principals as to the ownership voice in anticipated station managment. It is neither a multiple-choice option nor the proper subject of ongoing guesswork by those principals. Nor, of legal guesswork by lawyers or agency adjudicators. However, even if we were to affirm the *I.D.*'s award to IML of a constructively derived 50% "integration" factor (or, indeed, improperly raise that factor to the "upgraded" 66-2/3%), Augusta 54 has been awarded, if only tentatively, a 100% corresponding factor. Based on this "clear quantitative difference," IML could not here prevail. *See Utah Television Associates Ltd. Partnership*, 102 FCC 2d 1470, 1484, (Rev. Bd. 1985) (applications for Comm'n review pending). Its slight-to-moderate "comparative coverage" advantage cannot, in any event, outweigh

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[35] *See, e.g., Ventura Broadcasting Co.* v. *FCC*, 765 F.2d 184 (D.C. Cir. 1985); *see also Ft. Collins Telecasters*, FCC 86R-26, released May 9, 1986, at para. 14; *Arizona Number One Radio, Inc.*, FCC 86R-16, released March 26, 1986, at para. 16.

[36] "In doubt, the milder course is to be adopted." (Old legal maxim).

[37] *See also Tequesta Television Inc., supra* (separate statement).

August 54's substantial "integration" preference. *See Louisiana Super Comm. Ltd. Partnership*, 102 FCC 2d 1293, 1308 (Rev. Bd. 1985) (application for Comm'n review pending).[38]

19. ACCORDINGLY, IT IS ORDERED, That the application of Augusta 54 Broadcasting Company (File No. BPCT-830705KI) for a construction permit for a new television station at Augusta, Georgia IS GRANTED; and that the application of Independent Masters, Ltd. (File N0. BPCT-830701KF) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

[38] In *Louisiana Super*, the Board held that a "substantial integration preference significantly outweigh[ed a] slight coverage preference," which preference was based primarily on a comparative third service advantage of 11,938 persons. 102 FCC 2d at 1308. Here, IML has fourth and fifth service advantages of only 3,861 and 1,879 person, respectively, and has an overall service advantage of 24,072 persons. *I.D.*, para. 46. As in *Louisiana Super*, the service advantages are very small in relation to the applicants' overall population coverage, which fact lessens their significance. Although we, therefore, find IML's "comparative coverage" advantage to be not much more than "slight," we need not rule on Augusta 54's exception to the ALJ's characterization of IML's "slight-to-moderate" advantage. Augusta 54's clear quantitative "integration" factor prevails easily either way.

FCC 85D-62

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
INDEPENDENT MASTERS, LTD. August, Georgia	MM Docket No. 83-1246 File No. BPCT-830701KF
AUGUSTA 54 BROADCASTING COMPANY Augusta, Georgia	MM Docket No. 83-1251 File No. BPCT-830705KI
For a Construction Permit	

Appearances

Marie T. Riordan and *Robert A. Zauner*, on behalf of Independent Masters, Limited; *R. Clark Wadlow* and *Lisa B. Wershaw*, on behalf of Augusta 54 Broadcasting Company; and *Norman Goldstein*, on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: September 27, 1985; Released: October 3, 1985

I. Preliminary Statement

1. This proceeding involves mutually exclusive applications for authority to construct and to operate a new commercial television station on Channel 54 at Augusta, Georgia. Of eight original applicants for the facility, only two remain.[1]

[1] The following applications were dismissed with prejudice, upon the requests of the applicants: Augusta Family Television, Ltd. by *Order* released May 9, 1984 (84-2196); Carolina Christian Broadcasting, Inc., Prime Time Television, Inc., Southern Media Systems, Inc., and all by *Order* released May 9, 1984 (84M-2209); Orion Broadcasting of Augusta, Inc., by *Order* released June 14, 1984 (84M-2700); and Ro-Mar Communications, Inc., by *Order* released June 14, 1984 (84M-2701).

2. In a *Hearing Designation Order* (48 Fed. Reg. 54119) published November 30, 1983, the Commission, by the Chief, Mass Media Bureau, designated the competing applications for hearing in a consolidated proceeding on the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the application should be granted.

At the hearing, the presiding officer granted a motion by Augusta 54 that it be permitted to adduce evidence in an effort to show excellence of the previous broadcast experience of its principal, Howard A. Myrick (Tr. 19).

3. A prehearing conference was held on February 2, 1984. Hearing sessions were held on May 8 and 9, 1984. The record in this proceeding was closed by *Order* (FCC 85M-718) released February 15, 1985. Independent Masters submitted its proposed findings on March 28, 1985, and reply proposed findings on April 19, 1985. The Mass Media Bureau submitted proposed findings on March 29, 1985. Augusta 54 submitted proposed findings on March 29, 1985, and reply proposed findings on April 19, 1985.

Independent Masters, Ltd.

4. Independent Masters is a limited partnership. The partners, and their interests in the partnership, are as follows:

	Nature of Partnership Interest	*Percentage of Equity Ownership*
Henry Preston Elliott	General	20
Juanita Parks	General	10
Shirley L. Hook	Limited	70

(Independent Masters Ex. 1).

5. On the cutoff date for the filing of applications in this proceeding, Ms. Parks was not a principal of Independent Masters. Instead, Mr. Elliott was listed as the applicant's sole general partner and the holder of a 20 percent partnership interest; Ms. Hook was shown as a limited partner with an 80 percent partnerhship interest.

6. On August 23, 1983, the B-cutoff date for amendments, Independent Masters reported changes in its ownership structure showing the addition of Ms. Parks as a general partner with a 10

percent partnership interest, and showing that Ms. Hook's partnership interest had been reduced to 70 percent.

7. By *Memorandum Opinion and Order*, FCC 84-3914 (released September 13, 1984) the presiding officer concluded that the addition of Ms. Parks as a general partner effected a transfer of 50 percent control from Mr. Elliott to Ms. Parks, resulting in a gain of negative control by Ms. Parks and the loss of positive control by Mr. Elliott, thereby violating Section 73.3572(b) of the Commission's Rules. The presiding officer ordered the application of Independent Masters dismissed if, within fourteen (14) days, Independent had not restored control as it had existed on the application cutoff date and withdrawn its August 23, 1983 amendment. By an amendment filed on September 25, 1984, Independent Masters withdrew its amendment of August 23, 1983.

8. By an amendment filed on September 28, 1984, Independent Masters reported that its ownership was structured to include Ms. Parks as a general partner with a 10 percent partnership interest, and that its Limited Partnership Agreement was amended to reflect that the general partners are granted the right to vote in accordance with their respective equity interests. Independent Masters sought acceptance of its amendment on a *nunc pro tunc* basis. By *Memorandum Opinion and Order*, FCC 85M-273 (released January 17, 1985) the presiding officer accepted Independent Masters' amendment for Section 1.65 purposes only. The effect of these rulings is to limit Independent Masters, which claims 100 percent integration credit for the proposed integration of its two general partners, H. Preston Elliott and Juanita Parks, to 50 percent integration credit for Elliott, and no credit for Parks.

9. Mr. Henry Preston Elliott, a black male, is one of two general partners of Independent Masters. He presently resides in Atlanta, Georgia, where he has lived since 1977. He is currently employed by the Gemini Agency Inc., an advertising agency, as Vice-President, Marketing. If Independent Masters' application is granted, Elliott will resign from his position with the Gemini Agency, move his residence from Atlanta to Augusta, and become general manager of the proposed station. As the general manager, Elliott will work at least 40 hours per week, and will administer the day-to-day operations of the station, give overall direction to

all station functions, and have supervisory authority in all areas of station operation.

10. Mr. Elliott began his career in broadcasting in 1968 at station WERD (later WXAP, now WAEC), Atlanta, Georgia, as the station's announcer and music director. At WERD, Elliott also held the positions of production manager and account executive. He left WERD in June, 1974, and from 1974 to 1979, he worked for the Atlanta station of the Christian Broadcast Network (CBN), WANX-TV (now WGNX-TV), as an account executive and as senior account executive. In these positions, Mr. Elliott sold commercial announcements and wrote and produced commercials for various local advertising accounts. In 1979, he was promoted by CBN to the position of Southeast Regional Manager for the sale of commercial announcements on all of CBN's television and radio stations. In 1981, Elliott left CBN to form "The Associates", an independent advertising agency. After approximately one year, Elliot accepted employment with his present employer, the Gemini Agency.

11. Mr. Elliott is a member of the Bethany Baptist Church in Atlanta, Georgia. He was a trustee of the church from 1978 through 1981. He is a member of Operation PUSH, an organization which seeks to protect the rights of minorities and of the needy. In 1983, Elliott was responsible for the public relations effort for the Operation PUSH convention in Atlanta. Mr. Elliott is also an acitve member of the Martin Luther King Center for Non-Violent Social Change. In 1980, 1981, and 1982, Mr. Elliott arranged and managed the entertainment for the annual Martin Luther King birthday celebration held in Atlanta. He is a past member of the Atlanta chapter of the NAACP. He has been a member of the Atlanta Association of Black Journalists since 1982, and has been on the Board of Directors of the National Black College Choir Workship for ten years.

12. Juanita Parks is one of the two general partners of Independent Masters, and she holds a 10 percent equity interest in the applicant. She will be the general sales manager of the Augusta station. She currently resides in Morrow, Georgia, but will move to Augusta, Georgia, where she will work at least 40 hours per week at the proposed station. As the general sales manager, Ms. Parks will be responsible for the management of the sales operation of the station, including supervision of the local, regional and national sales staff.

13. Ms. Parks began her career in broadcasting at Atlanta stations WGKA and WZGC-FM (jointly owned by General Cinema Corp.) in 1968. She worked at WGKA and WZGC-FM until 1972, holding, at various times, the positions of Sales Secretary, Traffic Manager, Office Manager, Public Service Director, and assistant to the station's Vice-President and General Manager.

14. From 1972 to 1974, Parks was employed at Station WKLS, Atlanta, holding, at various times, the positions of Receptionist-Secretary, Bookkeeper, Traffic Manager, and Office Manager. From 1974 to 1975, she worked as a sales assistant and executive assistant to the Vice-President and General Manager of Station WAOK in Atlanta. From 1975 to 1976, Ms. Parks worked in the TV Operations Department (Traffic) at television station WTBS in Atlanta. In 1976, she was Traffic Manager of WSB and WSB-FM (Cox Broadcasting Company), in Atlanta. In 1979, she was promoted to the position of Executive Sales Assistant at television station WSB-TV. In this position, she was responsible for training and recruiting sales assistants and acted as the liaison between WSB-TV's management personnel and the sales department. While at WSB-TV, Parks was promoted to the position of Account Executive. She remained with WSB-TV until May of 1981, when she left to start her own advertising agency, the Wright Agency, which principally handled retail and entertainment accounts. While operating her advertising agency, Parks also engaged in part-time consulting work in the broadcast management field.

15. In June of 1982, Ms. Parks suffered injuries in an automobile accident, requiring her to discontinue operation of her advertising agency. In January, 1983, Parks returned to full-time employment, accepting a position with Universal Video Music in Atlanta, where she held the position of General and Local Sales Manager and Account Executive. Ms. Parks, a black female, was born in Atlanta, and holds an associate's degree in business administration.

16. Ms. Parks was a member of American Women in Radio and Television (AWRT) from 1978 through 1983. While a member, she served on the AWRT membership committee and was a member of the AWRT Speaker's Bureau. Ms. Parks is a lifetime member of the NAACP and has been a member of that organization since 1963. She has been a member of the Atlanta Advertising Club, the Atlanta Broadcast Executives Club, and the Atlanta Association of Black Journalists. In 1980, she taught a one-semester

course at Clark College in sales and advertising.

Augusta 54 Broadcasting Company

17. Augusta 54 is a limited partnership. The principals of Augusta 54, and their interests in the partnership, are as follows:

Name	*Position*	*Equity Interest*
Dr. Howard A. Myrick	Managing General Partner	10%
Felker W. Ward, Jr.	Limited Partner	40%
Randall L. Rader	Limited Partner	40%
Norma Crowder	Limited Partner	10%

As the sole general partner, Dr. Myrick has 100 percent voting control of Augusta 54 (Augusta 54 Ex. 1, p. 2).

18. Dr. Myrick, a black male, is a resident of Vienna, Virginia. He is committed to working full time, a minimum of 40 hours per week, as the General Manager of the proposed television station (Augusta 54 Ex. 3, Tr. 244). In this position, Dr. Myrick will supervise the day-to-day operation of the station, and will be responsible for the administration, engineering, programming, promotion, personnel, and financial managment (Augusta 54 Ex. 3). In the event of a grant of Augusta 54's application, Dr. Myrick will move his residence to the city of Augusta, Georgia, prior to program test authority for the station.

19. Dr. Myrick received a Bachelor of Science Degree from Florida A&M University in 1955 (Augusta 54 Ex. 4). He received a Masters Degree in cinema (motion picture/TV production) and a Ph. D. in communications and educational technology from the University of Southern California in 1967 and 1968, respectively.

20. Since 1983, Dr. Myrick has served as Chairman of the Radio, Television and Film Department at the School of Communications of Howard University in Washington, D.C. (Augusta 54 Ex. 4). He is responsible for the management and conduct of an academic program designed to prepare students for careers in radio, television, film and other communications technologies.

21. Dr. Myrick is also responsible for supervising a television production studio in the University's public television station, WHMM-TV, Channel 32. He supervises the production of educational, news, public affairs, and cultural programs which are to be broadcast over WHMM-TV. Dr. Myrick also teaches broadcast management to advanced students at Howard University.

22. From August 1982 to August 1983, Dr. Myrick worked full-time as the general manager of Clark College's radio station, WCLK-FM, Atlanta, Georgia. He supervised the day-to-day

operation of the station, including programming, promotion, administration, engineering, personnel, and financial management.

23. From 1977 to 1982, Dr. Myrick was employed as an Associate Director and then Director of the Office of Communications Research for the Corporation for Public Broadcasting. During that time, he managed a broadcasting research program, which provided a qualitative study of public television viewing.

24. From 1975 to 1977, Dr. Myrick was a Lieutenant Colonel in the United States Army, serving as Director and General Manager of the American Forces Radio & Television Service ("AFRTS"), the network headquarters for a worldwide broadcasting organization of more than 1,050 radio and television outlets in 27 foreign countries and the trust territories (Augusta 54 Ex. 4; Tr. 253-254). In these positions, Dr. Myrick was responsible for the development of policies and procedures for managing and operating the numerous broadcast outlets.

25. From 1973 to 1975, Dr. Myrick was the Director and General Manager of the American Forces Korea Network ("AFKN"), a nationwide radio and television network for American Armed Forces in Korea, part of the larger AFRTS.

26. From 1970 to 1973, Dr. Myrick served in the office of Manpower and Public Affairs at the Department of Defense where he was responsible for the procurement, production and distribution of motion picture films. He also served as liaison between the Defense Department and the television and motion picture industry.

27. From 1969 to 1970, Dr. Myrick served as Senior Educational Advisor to the Political Warfare Advisory Branch of the U.S. Military Advisory Command in South Vietnam. There, he provided on-site counsel and advice to the National Radio and Television systems in Vietnam.

28. From 1967 to 1969, while a Major in the United States Command and General Staff College at Ft. Leavenworth, Kansas, Dr. Myrick served as Chief and Director of the Instructional Television Division. In that position, he established, supervised the installation of, and managed a 6-channel closed circuit television/instructional television facility.

29. Dr. Myrick's association with the Augusta 54 application began while he was employed as general manager of WCLK-FM in Atlanta, Georgia (Tr. 261). At that time, he was approached by Felker Ward, an old friend and a partner in an Atlanta law firm, who asked Myrick if he would be interested in seeking a license for a television station (Tr. 262).

30. Augusta 54's "Agreement of Limited Partnership" provides that Myrick, the sole general partner, has contributed $10.00 in cash to the capital of the partnership and "no further contribution of capital" is to be required of him. The agreement further provides that Myrick's interest in the application is in exchange for services to be provided by him to obtain "an FCC Permit and License to construct and to operate the television station and effectuating necessary coordination for installation of the station antenna, location and leasing of a studio, and developing initial plans for equipping the station." (Independent Masters Ex. 6). A further provision of the agreement is that "The General Partner shall . . . Devote so much of his time as he deems necessary to successfully manage the affairs of the Partnership and may be compensated therefore under terms and conditions agreed upon by the Partnership." Finally, the limited partnership agreement contains this provision:

> b. *Performance of Partnership Obligations.* The General Partner shall use his best efforts to cause the partnership to observe and perform each and every obligation to be observed and performed by the Partnership under all agreements and undertakings made by the Partnership or by which the Partnership or the Project is bound. However, the provisions of this Paragraph shall not be construed to require the General Partner to provide funds to or on behalf of the Partnership in excess of the amounts to which he has specifically agreed under the provisions of this Agreement.
>
> The General Partner may pay all Partnership obligations with respect to which the General Partner has full potential liability before paying any Partnership obligations which are, by their terms, limited to recourse against specific properties.
>
> (Independent Masters Ex. 6, pp. 18–19).

31. Felker W. Ward, Jr., Randall L. Rader, and Norma Crowder, limited partners in Augusta 54, do not propose to be integrated into the operation of the station. Mr. Ward is a black male. Ms. Crowder is a black female.

32. Neither Independent Masters, nor any of its principals, has any cognizable interest in any medium of mass communications. Augusta 54 has no other interests in any medium of mass communications. Felker Ward, a limited partner of Augusta 54, owns less than a 1 percent interest of Cable Atlanta, Inc., the cable television operator serving metropolitan Atlanta, Georgia. At the time Augusta 54's application was filed, Mr. Ward owned less than 2 percent of Cable Atlanta, Inc. He is unconditionally

committed to divest his interest in Cable Atlanta, Inc., in the event of a grant of Augusta 54's application (Augusta 54 Ex. 2; Augusta App. Ex. 1; Augusta 54 Petition for Leave to Amend, filed February 16, 1984).

33. A comparison of the area and population proposed to be provided with primary service by each of the applicants is set out below:

	Total Grade B Service	
Applicant	Area (sq. mi.)	Population
Independent	7,975	543,587
Augusta 54	7,468	519,515

34. Neither applicant will provide service to an area that presently receives fewer than two primary services from existing television stations. The number of available services to the proposed uncommon areas are tabulated below (Independent Ex. 5, p. 3; Augusta 54 Engr. Ex., p.2).

	Independent		*Augusta 54*	
	Area (sq. mi.)	*Population*	*Area (sq. mi.)*	*Population*
3rd service:	165	5,069	81.0	1,208
4th service:	108	2,543	21.2	664
5th service:	548	22,608	28.6	799

(Independent Ex. 5, p. 3; Augusta 54 Engr. Ex., p. 2).

35. Augusta 54 proposes to provide an auxiliary power system for both its studio and transmitter system to ensure continued operation of the station in the event of an electrical power failure (August 54 Ex. 5).

II. Conclusions of Law

Integration

36. Independent Masters is entitled to 50 percent full-time integration credit for its proposal to integrate one of its general partners, Henry Preston Elliott, into the management of its proposed station as the general manager. Ms. Parks' interest in the applicant was acquired pursuant to an amendment which reflected an impermissible transfer of control. By virtue of its August 23, 1983 B-cutoff amendment, Independent Masters showed that it had voluntarily reduced the voting interest of Mr. Elliott from 100 percent, which it had been at the time the application was originally filed, to 50 percent. There being no expressed apportionment of voting rights between its general

partners, Independent Masters' addition of Parks removed positive control from Mr. Elliott and invested negative control in Ms. Parks. To now credit Independent Masters with 66-2/3 percent integration based on Mr. Elliott's present 66-2/3 percent voting interest would constitute prohibited comparative upgrading, as would crediting the 100 percent integration claimed by Independent Masters for the participation of both Elliott and Parks. *Clay Television, Inc.* 52 RR 2d 406; *New Continential Broadcasting Company*, 50 RR 2d 1117; *Central Texas Broadcasting Co., Ltd.*, 51 RR 2d, 1478.

37. Independent Masters' integration proposal is qualitatively enhanced by Mr. Elliott's minority status, only slightly by virtue of the fact that he proposes future residence in Augusta, and his past broadcast experience.

38. Augusta 54 proposes to integrate its sole general partner, Howard A. Myrick but, according to Independent Masters, "the facts of this matter require the conclusion that Augusta 54 is not entitled to any integration credit for this proposal." For that proposition, Independent places principal reliance on the Review Board's decision in *KIST Corp.*, 57 RR 2d 49 (1984).

39. The offending "partnership" in *KIST, supra*, involved an alleged principal who was said to be a general partner with a 35 percent interest. The applicant argued that, as a general partner, the alleged principal was "fully obligated to contribute proportionately to finance the construction and operation of the station." However, the Review Board observed that (a) if the application was denied, the alleged principal would have no obligation for the costs incurred by the partnership, (b) his share of the costs for the application and for constructing and operating the station was to be contributed by the non-minority, non-integrated partner as loans, and (c) the alleged principal would be obligated to repay those loans only out of his share of station profits, and only if and when any such profits should become available for this purpose. The Board held the alleged principal to be a partner "in name only", saying that the fact that he might, in the future, be obliged to pay his share "does not make him a true . . . partner at present." The Board then ruled that under these circumstances, where the principal could simply "walk away from the partnership with no less than when he entered it", having incurred no risk or any liability for future expenses or losses, there was no genuine partnership.

40. Independent Masters notes that Myrick's total capital contribution to Augusta 54 was a token payment of $10.00 and that the partnership agreement specifies that no further contribution of capital shall be required of him. Independent then construes the following provisions of Augusta 54's partnership agreement as "a bald effort to indemnify Myrick against any obligation to contribute any funds to the partnership . . . . ":

> However, the provisions of this Paragraph shall not be construed to require the General Partner to provide funds to or on behalf of the Partnership in excess of the amounts to which he has specifically agreed under the provisions of this Agreement. The General Partner may pay all Partnership obligations with respect to which the General Partner has full potential liability before paying any Partnership obligations which are, by their terms, limited to recourse against specific properties.

41. A primary characteristic of a true partnership is that each general partner is personally liable for the partnership debts. Independent argues that the above quoted provision appears to recognize that Myrick may find himself obligated to meet partnership obligations out of his personal resources, but claims that the provision "serves to protect him from this circumstance by allowing him to pay, out of partnership resources, all debts which might create any such personal liability before paying, out of partnership resources, obligations of the partnership which are secured . . . . "

42. It is not understood how that provision "protects" or relieves Myrick from personal liability for partnership debts. The provision is rather curious; nevertheless, it seems only to permit the general partner to establish an order of priority for paying partnership debts out of partnership property: he may devote partnership funds first to those unsecured partnership debts for which the general partner has full potential liability; remaining partnership resources may then be devoted to the payment of partnership debts which are secured by specific partnership property and for which the general partner still has full potential liability. By permitting the establishment of an order of priority for the payment of partnership debts, the scheme may tend to insulate the general partner to some degree, but it does not have the effect of "indemnifying" him with respect to any personal liability. In *KIST, supra*, the alleged general partner had been absolutely relieved of liability for the partnership's losses. That does not seem to be the case with Myrick. Finally, it is of no moment that the limited partners have borne and will bear all the costs involved in the project. *Wometco Enterprises, Inc.*, 57 RR

2d 1033 (1985). There is no evidence to suggest that the limited partners will direct the partnership business. The conclusion is that Augusta 54 presents a *bona fide* partnership, and that it is entitled to 100 percent integration credit for the full-time integration of its sole general partner, Howard A. Myrick. Augusta 54's proposal is qualitatively enhanced by Dr. Myrick's minority status and his proposed future local residence, and his past broadcast experience.

43. August 54 seeks some special credit for what it calls Dr. Myrick's "superlative" broadcast experience. The case sought to be made by Augusta 54 is the same that an applicant claiming a superior broadcast record would be expected to attempt: " . . . Dr. Myrick's past broadcasting experience is indicative of the unusual attention Augusta 54 will give to the needs and interests of the people in its service area." The argument lacks logical force. The presiding officer is unable to understand the manner in which Dr. Myrick's impressive listing of positions held in the past, and his accomplishments in those positions, "indicate" that Dr. Myrick's association with Augusta 54 will bring to Augusta, Georgia "unusual attention to the public's needs and interests, such as special sensitivity to [the] area's changing needs through flexibility of local programs designed to meet those needs . . . . " *Policy Statement*, 1 FCC 2d at 398. Augusta 54 will receive only minor enhancement of its proposal for Dr. Myrick's past broadcast experience.

44. Neither Independent Masters, nor any of its principals, nor Augusta 54 or any if its principals, has any cognizable interest in any medium of mass communications. The applicants are therefore equal under the diversification criterion of the standard comparative issue.

45. In this television case, Augusta 54 is entitled to no preference for its proposal to provide an auxiliary power system for its studio and transmitter system. *Minority Broadcasters of East St. Louis, Inc.*, FCC 85-131 (released March 22, 1985).

46. Independent Masters would serve a total of 24,072 more persons (residing in an area of 507 square miles) than would Augusta 54. Independent would provide a fourth and fifth television service to 5,069 and 2,543 persons, respectively. Augusta 54 would provide a fourth and fifth service to 1,208 and 664 persons, respectively. Independent merits a slight to moderate preference for its proposed service to relatively unserved areas and populations and service to a larger and population than Augusta 54.

III. Ultimate Conclusions

47. The applicants are equal under the diversification criterion, but Augusta 54 is the superior applicant on the integration criterion of the standard comparative issue. Augusta 54 is credited with 100 percent quantitative full-time integration, substantially enhanced by Dr. Myrick's minority status, and slightly enhanced by his proposed future local residence and past broadcast experience. Independent Masters is credited with 50 percent quantitative full-time integration for the participation of Mr. Elliott. The proposal is substantially enhanced by Elliott's minority status, and slightly enhanced by his proposed future local residence and past broadcast experience.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276[2] of the Rules, the application of Augusta 54 Broadcasting Company IS GRANTED, and the application of Independent Masters, Ltd., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

EDWARD LUTON, *Administrative Law Judge*

[2] In the event exceptions are not filed within thirty (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its public release pursuant to Section 1.276(d).

Common Carrier, International
International Communications

Report and Order adopted extending Recognized Private Operating Agencies status to enhanced-service providers, affirming a policy of voluntary sales of cable IRUs to users and referring question of Data Network Identification Codes-assignment and a domestic data-numbering plan to a committee of the telecommunications industry.
—*International Communications Policies*
CC Docket No. 83-1230

FCC 86-220

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
International Communications Policies Governing Designation of Recognized Private Operating Agencies, Grants of IRUs in International Facilities and Assignment of Data Network Identification Codes	CC Docket No. 83-1230

REPORT AND ORDER

Adopted: May 1, 1986; Released: May 12, 1986

BY THE COMMISSION:

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I. INTRODUCTION

1. On August 19, 1985, we released a Notice of Proposed Rulemaking in the above-captioned proceeding, FCC 85-369, ____ FCC 2d ____ (summary published in 50 F.R. 34867, August 28, 1985) (Hereafter NPRM), in which we announced tentative policies on three issues intended to facilitate the development of competition in the international communications and information-services markets. More specifically, we announced proposals (1) to extend recognized private operating agency (RPOA) status to enhanced-service providers who offer an international "public correspondence" service; (2) to allow enhanced-service providers and other non-carrier users to acquire indefeasible rights of user (IRUs) in international submarine telephone cables and to require the current carrier owners of such cables to make IRUs available at a negotiated price; and (3) to adopt a formal plan for the assignment of data network identification codes (DNICs) to U.S. public and private data networks. In our NPRM we included a preliminary analysis of each of these issues and pointed out a number of potential benefits and detriments associated with our proposed policies.

2. In response to our NPRM we received comments or reply comments from 32 persons, representing a wide range of common carriers, exchange telephone companies, enhanced-service providers, broadcasters and other users of international communications and information services. We also received comments from the United States Department of State. The international common carriers who filed comments are the American Telephone and Telegraph Company (AT&T), FTC Communications, Inc. (FTCC),[1] Graphnet, Inc. (Graphnet), the Hawaiian Telephone Company (HTC), ITT World Communications Inc. (ITTWC), MCI Interna-

[1] FTCC has, since filing comments in this proceeding, changed its corporate name to FTCC McDonnell Douglas International Telecommunications Company. For simplicity, we shall continue to use the traditional acronym FTCC.

tional, Inc. (MCII), RCA Global Communications, Inc. (RCAGC), TRT Telecommunications Corporation (TRT)[2] and The Western Union Telegraph Company (Western Union).

3. The exchange telephone carriers from whom we received comments are The Southern New England Telephone Company (SNET) and the seven holding companies which own the 23 former Bell Telephone Operating Companies which were divested from AT&T (now collectively known as the Regional Bell Operating Companies or RBOCs): The Ameritech Operating Companies (Ameritech);[3] The Bell Atlantic Telephone Companies (Bell Atlantic);[4] The BellSouth Corporation (BellSouth);[5] The NYNEX Telephone Companies (NYNEX);[6] The Pacific Telesis Group (Pacific Telesis);[7] the Southwestern Bell Telephone Company (Southwestern Bell); and U.S. West, Inc. (U.S. West).[8] We also received comments from the United States Telephone Association (USTA), a trade association representing local exchange telephone carriers (including the seven RBOCs and their subsidiaries) and the Exchange Carriers Standards Association, Inc. (ECSA), an association of exchange telephone carriers created to develop technical interconnection standards.

4. The enhanced-service providers from whom we received comments are CompuServe, Inc. (CompuServe), Equatorial Communications Services (Equatorial), General Electric Information Services Company (GEISCO), GTE Telenet Communications Corporation[9] and U.S. Telecom, Inc. (U.S. Telecom).[10] In addition, we

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[2] TRT filed only reply comments.

[3] Ameritech is a holding company for the Illinois Bell Telephone Co., the Indiana Bell Telephone Co., Inc., the Michigan Bell Telephone Company, The Ohio Bell Telephone Company and Wisconsin Bell, Inc.

[4] Bell Atlantic is a holding company for The Bell Telephone Company of Pennsylvania, the four Chesapeake and Potomac Telephone Companies (DC, MD, VA and W. VA), The Diamond State Telephone Company and the New Jersey Bell Telephone Company.

[5] BellSouth is a holding company for the South Central Bell Telephone Co. and the Southern Bell Telephone and Telegraph Company.

[6] NYNEX actually filed its comments in the name of its operating subsidiaries, The New York Telephone Company and the New England Telephone and Telegraph Co. For simplicity and uniformity, we shall refer to them collectively as NYNEX.

[7] Pacific Telesis filed its comments in the name of its operating subsidiaries, The Nevada Bell Telephone Co. and the Pacific Bell Telephone Company. For simplicity and uniformity, we shall refer to them collectively as Pacific Telesis.

[8] U.S. West, Inc., filed its comments in the name of its operating subsidiaries, The Mountain States Telephone and Telegraph Company, the Northwestern Bell Telephone Co. and the Pacific Northwest Bell Telephone Co. For simplicity and uniformity, we shall refer to them collectively as U.S. West.

[9] At its inception GTE Telenet was granted a license under Section 214 of the Act, *Telenet Authorization*, File No. I-T-C-81-274, adopted March 15, 1982.

received comments from Manufacturers Hanover Trust Company (MHTC), a commercial bank which also operates a private, international, X.25 packet-switched data network it calls GEONET. We also received comments from the three major commercial television broadcast networks (The American Broadcasting Company, Columbia Broadcasting System and The National Broadcasting Company) (Networks). We also received comments from a number of groups representing users of international telecommunications services, including the Ad Hoc Telecommunications Users Committee (Ad Hoc Committee), the Association of Data Processing Service Organizations (ADAPSO), the Committee of Corporate Telecommunications Users, (CCTU) and the International Communications Association (ICA). We also received comments from the Submarine Lightwave Cable Company (SLCC), a firm recently licensed to construct and operate a non-common-carrier, digital, optical-fiber cable between North America and Europe. Finally, by letter dated May 30, 1985, from Diana Lady Dougan, Coordinator and Director of the Office (now Bureau) of International Communications and Information Policy, United States Department of State, the Department submitted its views on the RPOA issue. We also received reply comments from 22 of those filing comments.[11]

5. After reviewing the pleadings filed in response to our NPRM, we have concluded to affirm our proposal to extend RPOA status to enhanced-service providers who provide a public-correspondence service, to make RPOA certification voluntary and to rely upon a streamlined application procedure. We have also decided to affirm our tentative conclusion that enhanced-service providers and other non-carrier users of international communica-

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While the Common Carrier Bureau there identified the services to be offered internationally as "enhanced," it also noted that action on Telenet's application occurred in the interim before *Computer II* became effective and that Telenet would subsequently be required to detariff its offering. Subsequently, we affirmed the Bureau action, *Telenet Decision*, 91 FCC 2d 232 (1982), *appeal docketed sub nom. Tymnet, Inc. v. FCC*, Case No. 82-2273 (D.C. Cir. 1982). We subsequently stayed the detariffing requirement. On February 22, 1985, we reaffirmed our detariffing requirement and denied a further request for stay. *Telenet Decision II*, 100 FCC 2d 776 (1985).

[10] U.S. Telecom is a common carrier licensed under Section 214 to provide domestic voice and data services but also owns a subsidiary, called UNINET, which is an unlicensed, enhanced-service provider.

[11] The following commenters did not file reply comments: The Networks, CCTU, ECSA, FTCC, ICA, ITTWC, MHTC, SNET, SLCC, and U.S. Telecom. GTE Telenet filed its reply comments late, accompanied by a Motion for Late Acceptance. U.S. West did not file reply comments, but filed an unauthorized pleading styled "Further Comments" in response to the replies of several parties, accompanied by a "Motion for Leave to File Further Comments."

tions are eligible to purchase IRUs in submarine telephone cables, but have decided to defer our proposal to require the owners of existing common-carrier cables to sell IRUs to users. With respect to the issue of DNIC assignment, we continue to believe that to avoid or minimize the possibility of a shortage of DNICs we must adopt a formal DNIC-assignment policy which will include a requirement for some networks to share DNICs. We also believe that the best sharing plan to adopt is a combination of the USTA and RBOC proposals (NPRM Options 4 and 5). We shall not now, however, prescribe a particular domestic data-numbering plan. We shall, rather, refer the question to the Committee T1-Telecommunications (T1 Committee) of the Exchange Carrier Standards Association[12] for further study and development of an industry recommendation. In the interim we shall require all public data networks which wish access to one of the eight shared DNICs before adoption of a final plan to use a domestic numbering plan based on the North American Numbering Plan (NANP) for telephony. We also provide for private data networks to share a separate DNIC or, at their option, to share the DNIC of the public network to which they are attached.

II. NOTICE OF PROPOSED RULEMAKING

6. This proceeding was instituted in response to a Notice of Inquiry issued in 1983,[13] which was itself in response to a series of petitions seeking clarification of a number of issues the petitioners believed must be answered before our pro-competitive *Computer II* policies[14] could be successfully extended to the international market. In *Computer II* we had drawn a distinction between "pure" communications services, which we designated as "basic" services and which in the United States have traditionally been provided by communications common carriers, and more

[12] The Exchange Carrier Standards Association (ECSA) is an organization representing a variety of communications networks created to develop interconnection standards. The ECSA operates through a subsidiary Committee known as T1, which in turn has created a series of technical subcommittees for specific tasks.

[13] International Communications Policies Covering Designation of Recognized Private Operating Agencies, Grants of IRUs in International Facilities and Assignment of Data Network Identification Codes, 95 FCC 2d 627 (1983).

[14] Amendment of Section 64.702 of the Commission's Rules and Regulations, (Second Computer Inquiry), 77 FCC 2d 384 (1980), *reconsid.*, 84 FCC 2d 50 (1980), *further reconsid.*, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC, 693 F. 2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *second further reconsid.*, FCC 84-190 (released May 4, 1984). [Hereinafter cited as *Computer II*].

recent information services which combine basic communications with computer processing that acts upon the form or content of the sender's information, which we designated as "enhanced."[15] The problem to which this proceeding is addressed is that the basic/enhanced dichotomy is not observed by other nations and does not exactly parallel the distinction set forth in the regulations and recommendations promulgated under the International Telecommunication Convention[16] between "telecommunications" and "data processing." That is, while all of the services we treat as "basic" are classified as "telecommunications" under the ITU regulations, and all of the services which the ITU regulations classify as "data processing" we consider "enhanced" under *Computer II*, there are services which we treat as enhanced which fall outside the ITU concept of data processing. These services are primarily so-called "protocol processing" functions, where the provider acts upon the form but not the content of the sender's information.[17] Such services are treated under the ITU regulations as "telecommunications." This lack of parallel treatment creates a problem because we restrict basic services to common carriers certificated under Section 214 of the Communications Act, 47 U.S.C. § 214 (1976), but allow providers to offer enhanced

[15] Section 64.702(a) of our Rules and Regulations, 47 C.F.R. § 64.702(a) (1985), defines "enhanced services" as "services, offered over common carrier transmission facilities . . . , which employ computer processing applications that act on the form, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." The term "basic" service is not separately defined, but refers to communications transport or message services without computer enhancement.

[16] International Telecommunication Union, International Telecommunication Convention, (Edition Nairobi, Kenya) (Geneva, 1982). [Hereinafter cited as ITU Convention]. The ITU Convention is the basic instrument creating and defining the role of the International Telecommunication Union (ITU). The ITU is a specialized agency of the United Nations whose primary function is to set technical standards for world telecommunications to prevent harmful interference and to develop the basic operating arrangements under which member nations communicate. The United States is a member of the ITU. The ITU Convention has the status of a treaty under United States law. The ITU has a number of subsidiary bodies charged with carrying out particular aspects of the ITU's responsibilities, the most important of which for present purposes are the CCIR and the CCITT, the International Radio Consultative Committee and the International Telegraph and Telephone Consultative Committee, respectively. These committees develop technical and service regulations and recommend standards applicable to their respective areas of responsibility.

[17] Such services are those defined in the first clause of Section 64.702(a). We currently are reexamining our regulatory treatment of such services in the *Third Computer Inquiry*. *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Notice of Proposed Rulemaking, CC Docket No. 85-229, 50 Fed. Reg. 30581 (August 20, 1985).

services on a competitive basis without certificate and free of pervasive, common-carrier regulation. We are thus in this proceeding seeking to reassure overseas communications entities[18] that neither our basic/enhanced dichotomy nor our decision to forbear from regulating enhanced-service providers will prejudice any of their rights under the Convention and regulations and to develop policies which will facilitate the introduction of competitive, international data services between the United States and overseas points.

A. RPOA Status

7. In our NPRM we tentatively concluded that formally designating enhanced-service providers as RPOAs could reassure PTTs that such providers will obey the ITU Convention and CCITT regulations and might thereby help the providers obtain operating agreements.[19] We also tentatively concluded that enhanced-service providers who offer a "public correspondence" or message service could meet the requirements for designation as RPOAs under the ITU Convention.[20] We indicated in this regard that we do not

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[18] While the United States relies for its communications and information services upon private, for-profit common carriers and enhanced-service providers, most of the world relies upon government-owned communications entities, referred to under the ITU Convention, regulations and recommendations as "administrations," and most commonly known as Administrations of Posts, Telegraph and Telephone or PTTs. Throughout this Report and Order, except where referring precisely to "administrations" under the ITU documents, we shall use the term PTT to refer to such government-owned or -operated communications entities.

[19] We also noted in our NPRM that responsibility to designate U.S. RPOAs rests with the Department of State as U.S. Signatory to the ITU Convention and that our policy, if made final, would be a recommendation to the Department of State.

[20] The ITU documents refer to "administrations," which the Convention defines as:

> [a]ny governmental department or service responsible for discharging the obligations undertaken in the International Telecommunications Convention Union and the Regulations. ITU Convention, Annex 2, p. 148.

and RPOAs, which the Convention defines as

> [a]ny private operating agency . . . which operates a public correspondence or broadcasting service and upon which the obligations provided for in Article 44 of the Convention are imposed by the Member in whose territory the head office of the agency is situated, or by the Member which has authorized this operating agency to establish and operate a telecommunications service in its territory. *Id.* at 149.

The Convention, in turn, defines a "private operating agency" as

> [a]ny individual or company or corporation, other than a governmental establishment or agency, which operates a telecommunication installation intended for an international telecommunication service or capable of causing harmful interference with such a service. *Id.*

find the term "public correspondence" used in the definition of RPOA to be synonymous with the term "common carrier" used in the Communications Act.[21] Rather, we concluded that "public correspondence" is a synonym for "telecommunications services" as used in the Convention and is intended to distinguish between message services — where the service provider transmits the customer's information essentially unchanged — and "data processing" — in which the service consists of manipulating, altering or otherwise acting upon the content of the customer's information. We also noted that "data processing," as defined in CCITT Recommendation D.1,[22] is not considered a public offering but is classed as a permissible use of a leased-channel service.[23] We, thus, concluded that a U.S. enhanced-service provider which provides a message service, as opposed to pure data processing, would be eligible for designation as an RPOA. We also cited several examples of enhanced services the providers of which would be eligible for RPOA status: packet switching,[24] code and protocol conversion, services which act upon the form but not the

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[21] The Convention defines "public correspondence" as "[a]ny telecommunication which the offices and stations must, by reason of their being at the disposal of the public, accept for transmission." *Id.* at 148.

[22] International Telephone and Telegraph Consultative Committee, Recommendation D.1, "Red Book" (Deliberations of the VIIIth Plenary Assembly, held at Malaga-Torremolinos, Spain, October 8-19, 1984) [Hereinafter cited as CCITT Red Book], Vol. II Fascicle II.1, § 7.2, p.11 (Geneva, 1985). Recommendation D.1 defines "data processing" as "the use of the computer for a combination of operations such as calculating data, merging, sorting, and so on, in accordance with programmed instructions, as distinguished from [using the computer for] circuit, message or packet switching."

[23] The term "leased-channel service" refers to the provision of a channel of communication between two fixed points, charged for on the basis of a flat monthly rate, and available for the exclusive use of the lessee 24 hours a day, seven days a week. It is synonymous with the term "private line" used in domestic U.S. communications. It is also synonymous with the term "private leased circuit" used in CCITT Recommendation D.1.

[24] The term "packet switching," in its strict sense, refers not to a service but to a type transmission technology. Thus, fundamental packet-switched message service, where the form or content of the customer's intelligence is unaltered, would constitute a "basic" communications service under our *Computer II* rules. Many packet-switched service offerings, however, include "code and protocol conversions" which allow communications terminals of one type to communicate with incompatible terminals. Such a packet-switched service plus code conversion is defined as enhanced under our *Computer II* rules, because the service provider acts upon the form of the customer's information, and the service may be offered without a Section 214 license. Such a service, however, would still constitute a message or public-correspondence service under the ITU Convention, since it does not involve computer processing which alters the content of the communication, and would be classified as "public correspondence" under the CCITT regulations and recommendations.

content of the communication, and electronic mail or other "store and forward" services.

8. We also noted in our NPRM that, while it appears that extending RPOA status to enhanced-service providers could be useful, it is not the fact of RPOA designation which requires enhanced-service providers to obey the Convention and regulations. Rather, we noted that such obligation flows from the fact that the United States government is a Signatory to the ITU Convention and is required under Article 44 thereof[25] to assure that all U.S. nationals or other entities operating within its borders obey the binding international regulations.[26] As a result, we indicated that we believe we should make RPOA status freely available, as we do not want RPOA designation to become a barrier to entry or a cumbersome substitute for common-carrier licensing.

9. In that vein, we indicated a preference to make RPOA designation simple — based on the filing of a relatively simple application form — and voluntary. We stated that we saw no reason to require RPOA designation for every enhanced-service provider. We noted that entities seeking to offer a public-correspondence-type enhanced service internationally must first obtain an operating agreement[27] from a PTT. We indicated that, if a PTT is content to deal with a U.S. enhanced-service provider, without formal RPOA designation, we see no reason ourselves to require RPOA status. Finally, we included a proposed application form, patterned on an application for certification under Section 214 of the Communications Act as a common carrier, which would solicit basic information about an entity seeking RPOA status and

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[25] Article 44 provides that

> The members are bound to abide by the provisions of this Convention and the Administrative Regulations in all telecommunications offices and stations established or operated by them which engage in international services or which are capable of causing harmful interference to radio service of other countries . . . .

[26] It should be noted that neither Section 214 of the Communications Act, nor Part 63 of our Rules and Regulations implementing Section 214, mentions the ITU Convention or regulations or imposes a duty to obey them. Rather, the duty of common carriers to obey the Convention also flows from the U.S. government's obligations under Article 44.

[27] We also noted that the term "operating agreement" had traditionally been used to refer to the contract between two administrations or between an administration and a U.S. common carrier which spells out all the financial and other arrangements under which the two jointly offer service. *See* FCC 85-369, at para 6, f.n. 6. We indicated that we would use the same term in this proceeding to refer to a similar agreement between an administration and a U.S. enhanced-service provider.

require it expressly to promise that it will obey the ITU Convention and regulations. An applicant for RPOA status would file its application with us. Our staff would note the filing in its weekly summary of filings, review the application for completeness and prepare a recommendation to the Department of State for action. While we provided for interested persons to raise relevant comments informally by letter, we tentatively concluded not to provide for formal petitions to deny.

B. Non-carrier IRUs

10. In our NPRM we tentatively concluded that enhanced-service providers and other non-carrier users are eligible under the Communications Act to hold IRUs[28] in submarine cables and that allowing such private IRUs would serve the public interest. Accordingly, we proposed to allow non-carriers to acquire IRUs from carriers and, if the carriers are not willing to transfer IRUs, to require such transfers. We recognized, however, that our recent decision to allow construction of non-carrier submarine cables[29] would give users an alternative to common-carrier cables and obviate the necessity to require IRU transfers. However, due to uncertainty as to whether such non-carrier cables would actually be constructed, we tentatively decided to proceed with our policy and to review the transfer requirement as we gained more knowledge of the non-carrier cables, but promised to revisit the question not later than two years from adoption of a final policy in this proceeding. However, as we also tentatively concluded that the transfer of IRUs in common-carrier cables is not fundamentally a common-carrier activity, we proposed to allow the parties to set the price for such IRUs by negotiation — although we indicated that we would step in if AT&T or other carriers acted unreasonably.

11. We found that a policy requiring involuntary IRU transfers in cables is not forbidden by the Fifth Amendment to the U.S. Constitution. Rather, we found that the Fifth Amendment permits takings of private property so long as the taking is for a valid "public use" and so long as the person from whom the property is taken receives just compensation. Since we proposed

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[28] The term indefeasible right of user, or IRU, refers to a form of capital acquisition of transmission facilities in which the IRU holder has most of the indicia of ownership, but lacks the right to control the facility or, depending upon the particular IRU contract, any right to salvage.

[29] Tel-Optik, Ltd, File Nos. I-S-C-L-84-002 and I-S-C-L-84-003, mimeo 4618 (released May 17, 1985), and Submarine Lightwave Cable Co., File No. S-C-L-84-001, mimeo 5241 (released June 19, 1985).

to require buyers of IRUs to compensate the carrier owners, we found that the carriers would receive just compensation. We also tentatively concluded that the public-interest benefits to users of private IRUs would satisfy the public-use test, notwithstanding that the users who would acquire the IRUs are private interests. We also found our proposal to require IRU transfers to be permissible under the Communications Act. We noted that the government's power to take property arises from the same "police powers" as its power to regulate communications firms. We thus concluded that our general powers to regulate communications in the public interest empower us to require sales of IRUS.

C. DNIC Assignment

12. Finally, our NPRM proposed to adopt a formal policy governing the assignment of DNICs. The DNIC, or data network identification code, is a four-digit number used to identify data networks and which is the central device of the international data numbering plan developed by the CCITT and set forth in Recommendation X.121.[30] To facilitate the introduction and interworking of "public data networks"[31] throughout the world, Recommendation X.121 provides a uniform numbering plan which calls for assigning to each subscriber a unique "international data number" (IDN) which it defines as a 5-14 digit number (the exact number of digits to be determined by each ITU member[32]), the first four digits of which are the DNIC of the network to which the subscriber is attached. The DNIC, in turn, is broken down into its first three digits, which Recommendation X.121 defines as the data country code (DCC), which identify the region and country of the data network,[33] and its fourth digit, called the "network identifier," which identifies particular networks within the country identified by the DCC. As a result 10 DNICs can be derived from each DCC. The 1-10 digits which follow the DNIC

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[30] CCITT Red Book, Vol. VIII, Fascicle VIII. 4, pp. 269-81 (1985).

[31] A "public data network" is defined as "[a] network established and operated by an Administration [or RPOA] for the specific purpose of providing data transmission services to the public. Circuit switched, packet switched and leased circuit data transmission services are feasible, depending on national regulations. The public data network may carry traffic of other services." CCITT Recommendation X.15, Red Book, Vol. VIII, Fascicle VIII.2, p. 53.

[32] Some countries still rely upon electromechanical switching equipment which is limited in the number of digits it can handle, while others employ more flexible computer switches. Recommendation X.121 seeks to accommodate all types of switching equipment.

[33] The first digit of the DCC identifies the region and the next two digits to the particular country. Recommendation X.121 divides the world into six zones. The United States is in Zone 3, North America and the Caribbean basin.

constitute the "network terminal number" (NTN) and identify particular subscribers attached to a network identified by the DNIC.

13. The DNIC is intended to identify and permit automated switching of data traffic to particular networks.[34] The problem for the United States is that the number of DCCs available to it, and hence the number of DNICs which can be derived therefrom, is limited. At present the CCITT has allocated the United States seven DCCs (310-316) which can be used to derive 70 DNICs for networks within the contiguous 50 states. In addition, Recommendation X.121 has left a gap of an additional 13 DCCs (317-329) before the next allocation.[35] In addition, the CCITT has allocated the United States a DCC (330) for networks in Puerto Rico, one (332) for the Virgin Islands, one (525) for Guam and one (544) for American Samoa.[36] Using the 20 contiguous DCCs assigned or reserved, the United States will be able to assign a total of 200 DNICs.[37] The problem is that the United States, as a result of historical evolution and a preference for competition, has evolved a three-tier structure of data networks: (1) local exchange networks; (2) domestic interexchange networks; and (3) networks with overseas lines. Those three types of networks are also subdivided between those operated by intra-state telephone carriers, interstate common carriers and enhanced-service providers. Finally, we have authorized a variety of private data networks which we permit to interact with public networks. In addition to the large number of such networks which already exist, we anticipate that still more will enter the market in the future. As a consequence, our NPRM noted that it is likely that we will receive requests for more than 200 DNICs.[38]

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[34] Our NPRM indicated, at para. 45, that there are at least three uses of a DNIC under Recommendation X.121: (1) to identify a destination network for switching purposes; (2) to identify a transit carrier in the "facility request part of the selection signal" (also called the "RPOA-selection or field"); and (3) to identify the calling party in the "calling address." The DNIC is also used under Recommendation X.75 to identify a transit network for billing purposes.

[35] The United States has already notified the ITU that it will need to use these additional 13 DCCs and requested it to reserve them for its use.

[36] *See* Recommendation X.121, Annex D.

[37] There are, at present, a total of 68 DCCs in Zone 3 which have not been allocated. It might be possible for the United States to obtain some additional DCCs for its use, but would be required to obtain the agreement of other nations in Zone 3 to such an assignment.

[38] The responsibility for assigning DNICs in the United States rests ultimately with the Department of State as the U.S. Signatory to the ITU Convention, but the Department delegated the responsibility to the Commission. Pursuant to that delegation we have assigned 42 DNICs. In addition to the 33 we identified in our Notice of Inquiry, 95 FCC 2d at 655-6, and the additional

14. Our NPRM tentatively concluded that the DNIC is required for the routing of domestic as well as international traffic and that operators of data networks, both public and private, common-carrier or enhanced-service, will need access to a DNIC.[39] We thus tentatively concluded that we should not tie the assignment of a DNIC to common-carrier status or to formal designation as an RPOA, but should base assignments upon need. We also tentatively concluded that, in view of the potential shortage, that we cannot continue to assign DNICs on a first-come, first-served basis, but must develop a DNIC-assignment procedure which will conserve DNICs for future uses and give everyone access to a DNIC. To this end, we tentatively concluded that we should require networks, to the maximum extent possible, to share DNICs and to develop a domestic data-numbering plan to differentiate networks sharing a DNIC.[40]

15. Based on the comments filed in response to our Notice of Inquiry, we set forth in our NPRM five characteristics we believe a DNIC-assignment procedure must include and seven that appear to be desirable.[41] We also put out for comment six specific

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three we identified in our NPRM, para. 13, f.n. 20, we have assigned DNICs to the following entities: Computer Sciences Corporation (3137); Fedex International Transmission Corporation, (3138); Net Express Communication, Inc. (3139); Southern New England Telephone Co. (3140); Bell Atlantic Telephone Companies (3141); and BellSouth Corporation (3142).

[39] Recommendation X.121 calls for assignment of separate DNICs only to public data networks. Annex B to Recommendation X.121 provides for private data networks to share one or more DNIC. In such cases the individual networks would be distinguished by the first six digits of the NTN following the DNIC, which Annex B defines as a "private network identification code (PNIC).

[40] We also observed that the North American Numbering Plan (NANP) for telephony, the plan under which telephone numbers and area codes in the United States and Canada are assigned, might represent a useful paradigm for constructing a numbering plan for U.S. data services. The NANP was developed to implement in the United States the international telephone-numbering scheme set out in CCITT Recommendations E.160–E.163, Red Book, Vol. II, Fascicle II.2, p. 97.

[41] The features that an assignment procedure must have are the following: (1) It must be fair, consistent and not provide any service provider with an undue marketing or operational advantage; (2) it must permit overseas administrations to route calls to all U.S. subscribers on a network solely by use of a DNIC or DNICs; (3) it must permit successful routing from and to all domestic subscribers; (4) it must permit a customer in the United States to choose its interexchange carrier for inter-LATA calls and its U.S. overseas carrier for overseas calls; and (5) it must provide for equal dialing arrangements (*i.e.*, all users must dial the same number of digits). The desirable features are as follows: (1) An assignment procedure should be easy to administer and allow a simple, objective allocation of DNICs and data numbers; (2) it should minimize the number of DNICs which must be assigned; (3) it should minimize duplicative numbering where private networks are connected to more than one network; (4) it should minimize the number of digits a network switch must

options which had either been suggested by the parties or, in one case, (Option 6) developed by the Commission staff. These six options are as follows: Option 1 (first-come, first-served); Option 2 (Marketplace [*i.e.*, auction or lottery] procedures); Option 3 (a series of National DNICs); Option 4 (One Shared Nationwide DNIC); Option 5 (a series of seven shared regional DNICs); and Option 6 (an integrated numbering plan relying upon 164 shared regional DNICs and a comprehensive, overall numbering plan for individual data networks). As a device to focus comment, we included a preliminary analysis of each plan based on the required and desirable objectives we had identified. Each of the options is described in our NPRM, paras. 50–70, and those descriptions will not be repeated here.

16. In addition to the objectives of a DNIC-assignment procedure, our NPRM also identified a phenomenon which would arise under a program of shared DNICs which we believed might prove troublesome: what we called a "routing ambiguity." A routing ambiguity refers to the possibility that an interexchange carrier would be unable to deliver traffic to a particular destination network because the two networks are not interconnected. Routing ambiguities can occur under shared DNICs whenever an interexchange carrier is connected to some, but not all, of the destination networks sharing the DNIC. If the interexchange carrier were to receive traffic from overseas routed to the shared destination DNIC but was unable to deliver it to the destination network, the call attempt would fail. We noted a concern that such incomplete call attempts would burden the international and U.S. domestic networks and that, if frequent, could increase system costs and reduce efficiency. We also tentatively concluded that the only way to avoid routing ambiguities would be an extensive, and potentially expensive, program of network interconnection. We requested interested persons to comment upon the issue and to suggest possible solutions.

III. SUMMARY OF COMMENTS

17. In response to our NPRM we received comment from a variety of carriers, enhanced-service provider and user interests. We also received the views of the Department of State. Every

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analyze to effect call delivery; (5) it should permit easy recognition of destinations which will require inter-LATA transmission; (6) it should minimize impact of its institution upon existing customers; and (7) it should provide for easy evolution to whatever numbering plan is adopted for integrated services digital network.

entity filing comments, however, did not address all of the three issues set for investigation. In view of the number of respondents, and the fact that many respondents express the same views, in the summary which follows we shall for simplicity set forth the major arguments presented, without separate identification of who advanced the argument, unless such identification is necessary or helpful in analyzing the issue.

A. RPOA Status

18. Thirteen respondents[42] addressed the issue of RPOA status for enhanced-service providers. Of these, nine fully supported our NPRM proposal and two "generally" agreed that we should make RPOA status readily available to enhanced service providers, but recommended some modifications to our proposed DNIC-certification process. Only two, RCAGC and FTCC, both certificated international common carriers who also provide enhanced services, opposed our proposal to extend RPOA status to enhanced-service providers.

19. *Eligibility.* Most of the comments agreed with our NPRM that enhanced-service providers who offer a "public correspondence" — as distinct from data processing — are eligible for designation as RPOAs. They also agree that the ITU definition of "private operating agency" does not limit RPOA status to "common carriers." Rather, they agree that each ITU member has the right to choose the type or types of private operating agencies on which it will rely for its communications. They also agree that the term "common carrier" (the traditional U.S. type of private operating agency) is a creation of U.S. law which has no legal significance outside the borders of the United States. For the same reason they agree that the term "public correspondence" used in the ITU definition of RPOA does not equate to "common carriage" under U.S. law and that it does not require the holding out of service indifferently to the public — which is the U.S. definition of common carriage.

20. Rather, the comments generally concur that the term "public correspondence" identifies message telecommunications services — *i.e.*, services where the content of the sender's information is unchanged — which were the types of services traditionally offered by administrations.[43] ADAPSO, for example, argues that

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[42] The Ad Hoc Committee, ARINC, AT&T, ADAPSO, CCTU, CompuServe, Equatorial, FTCC, GEISCO, GTE Telenet, ICA, RCAGC and U.S. Telecom.

[43] AT&T, however, while supporting the proposal to extend RPOA status to enhanced-service providers, asks us clearly to state the RPOA designation

the term is intended to distinguish providers of message services from those who offer pure data processing — which it notes is defined not as a public offering but as a permissible use of a leased channel. ARINC, on the other hand, would equate the term "public correspondence" with "transmission" and find eligible for RPOA status any enhanced-service provider or other entity which offers an international "transmission."[44] ARINC argues that such an interpretation does no more violence to the term "public correspondence" than the interpretation in our NPRM and avoids what it calls a "definitional inconsistency" between our NPRM here and our decision in *Computer II.* That is, ARINC believes that the phrase "at the disposal of the public" in the definition of "public correspondence" is essentially identical to an "indifferent offering" of service and equates to common carriage under U.S. law. As a result, ARINC believes that public correspondence is "essentially synonymous" with common carriage. ARINC believes that our interpretation would turn the offer of enhanced services into public correspondence — that is to say, common carriage — and is thus inconsistent with *Computer II* were we held that enhanced services are not common carriage. In any event, ARINC asks us to make clear that entities other than those who offer public correspondence can be designated as RPOAs. ARINC notes that it is now the only U.S. RPOA which is not a broadcaster or a common carrier and that it does not offer a public correspondence. ARINC notes that it is an RPOA because it has been designated by the United States to fulfill certain U.S. treaty obligations (the CCIR Radio Regulations) to provide safety-related and air-traffic control communications.[45]

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would not give them the right to acquire IRUs in cables.

[44] The term "transmission" is not defined in the ITU Convention. In our Notice of Inquiry and NPRM in this proceeding, we interpreted the term as a synonym for "telecommunication," a term which the Convention defines as "[a]ny transmission, emission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic systems." ITU Convention at 150.

[45] ARINC notes that it is the primary U.S. provider of air operational control communications and that it offers international HF air traffic control services within certain flight information regions (FIRs) operated by the United States which extend beyond the borders of the United States. ARINC further notes that the ITU Radio Regulations allocate the frequencies it uses for these services solely for aeronautical mobile radio services and expressly forbid their use for public correspondence. *See* ITU, Radio Regulations, Article 8 (Revised 1985). *See also* ITU, Radio Regulations 3633 (Revised 1985): "Administrations shall not permit public correspondence in the frequency bands allocated exclusively to the aeronautical mobile service."

21. The only contrary view is the argument by FTCC and RCAGC that the RPOA status should be limited to regulated common carriers and that an "automatic" or "indiscriminate" grant of RPOA status to unregulated enhanced-service providers would confuse or devalue the RPOA concept. RCAGC argues that the RPOA definition was crafted to accommodate U.S. private common carriers and was intended to describe the kind of indiscriminate public services offered by such carriers. RCAGC characterizes our proposal as an impermissible attempt unilaterally to redefine the RPOA concept. RCAGC asserts that designating enhanced-service providers as RPOAs will not turn their service offering into common carriage and will damage international comity by demanding that the PTTs treat "an undefined and essentially regulated class of service providers" the same as they do carriers, even though such entities are under no obligation of indiscriminate public service. FTCC agrees with RCAGC that our proposal to award this valuable status only upon an "unverified" promise to obey the ITU regulations will render it "essentially meaningless." FTCC argues that RPOA status has value because it has been only sparingly granted and only to regulated carriers. FTCC believes that such a devalued status will not reassure the PTTs and, as a result, will not help enhanced-service providers to get operating agreements. Further, FTCC also questions our intent or our authority to monitor the conduct of enhanced-service-provider RPOAs or our authority to take corrective action. Instead, FTCC recommends that we limit RPOA status to regulated common carriers, that we require all RPOAs to file copies of their operating agreements with overseas PTTs and to file reports of their traffic under Section 43.61 of our Rules and Regulations.[46] FTCC finds such steps necessary for us to honor our obligations under Article 44 and argues that an entity cannot reasonably seek the benefit of governmental recognition without submitting itself to governmental oversight.

22. *Certification Process.* Most commenters also support our proposal to rely upon a simple, voluntary RPOA-certification process. Those entities support the aim of our NPRM not to place unnecessary financial or regulatory burdens upon enhanced-service, and, particularly, our desire not to let RPOA certification become a substitute for Section 214 licensing. They also support our proposal not to require a prior operating agreement for RPOA status.[47] The only challenge to our proposal was by two user

[46] 47 C.F.R. § 43.61 (1985).

[47] GTE Telenet states that granting RPOA status to an entity which does not

groups, ADAPSO and ICA,[48] who argue that we should make RPOA certification mandatory. Both argue that the ITU Convention requires RPOA status for all private entities who seek to offer an international public correspondence (*i.e.*, the Convention speaks only of RPOAs and administrations) and that mandatory RPOA certification is vital to preserving the availability of full-period, flat-rate leased channels.

23. ADAPSO argues that only RPOAs should be allowed to resell leased channels. ADAPSO notes that CCITT Recommendation D.1 forbids the resale of leased channels[49] and requires other administrations and RPOAs to withhold service from users who violate this prohibition.[50] ADAPSO argues that an enhanced-service provider who seeks to offer a message or telecommunications enhanced service (those our NPRM found eligible for RPOA status) via a lease channel would violate the resale prohibition. More importantly, according to ADAPSO, the PTTs are unable, absent a requirement for mandatory RPOA certification, to identify which U.S. enhanced-service providers intend to offer pure data processing (who do not need an operating agreement) and which propose to offer a message or telecommunications service (who do need an operating agreement). ADAPSO notes that some PTTs have expressed a concern that data processors could, if they wished, use their leased-channels to offer third-party traffic (*i.e.*, resell them) in violation of Recommendation D.1, without the PTTs' being unable to detect them. ADAPSO and ICA both indicate a fear that PTTs, unable to detect violations of the resale prohibitions and unable to identify potential violators, will simply refuse to offer leased channels at all.

24. ADAPSO states that it has no problem with our proposal to rely upon a simple RPOA-certification process, but argues that our proposed process needs to be clarified or modified in several respects.[51] ADAPSO urges us to state clearly that our certifica-

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have an operating agreement would "diminish the significance" of RPOA status but states that it does not oppose adoption for our proposal. Indeed, CCTU states that it fears that PTTs will make RPOA status a prerequisite to negotiating an operating agreements and argues that it is therefore vital that we employ a simple process for obtaining RPOA status.

[48] The Department of State asserts that it would be "appropriate" that a domestic entity be designated an RPOA before it offers an international public-correspondence service.

[49] *See* CCITT Recommendation D.1, §§ 1.7, 1.8, 5.1, 6.1.3, 7.2 and 7.3.

[50] *Id.* at § 1.10.

[51] The Department of State states that it has reviewed the proposed process with ADAPSO and concurs in ADAPSO's Supplemental Comments filed in response to our Notice of Inquiry in this proceeding. That proposal is essentially recreated in its comments on our NPRM.

tion procedure is not "automatic." ADAPSO cites the view of the Department of State that RPOA certification is a formal act of the United States government which requires the government to make specific representations to other governments concerning an entity designated as an RPOA. As a result, ADAPSO believes such action cannot be "automatic." In this connection, ADAPSO notes that the procedure outlined in our NPRM would require the Commission to review the application for RPOA status and to prepare a recommendation and that it would require the Department of State to take the final action. ADAPSO states that such a procedure does not appear to be automatic, and that in view of the sensitivity of the PTTs, it should not be so characterized.[52]

25. ADAPSO also asks us to modify our proposed application form to require applicants to file information as to their ownership — particularly to indicate whether it is foreign owned.[53] ADAPSO notes in this connection that the Department of State has indicated a need for ownership information to permit it to perform its functions.[54] ADAPSO argues that, since the Department of State cannot act upon a request for RPOA status without ownership information, it will be required to seek the information separately unless it is included in the application form. ADAPSO thus, believes that soliciting the information in the application could speed up Department of State action. ADAPSO also argues that it is necessary to identify foreign-owned enhanced-service providers so that the Department of State and the Commission can protect the competitive position of U.S. entities in overseas markets. ADAPSO notes that foreign-owned entities can offer enhanced services in the United States without a license. Once established, ADAPSO asserts that such

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[52] In this connection, ADAPSO comments on our proposal to allow only informal comments on an application for RPOA status. ADAPSO urges us to make clear that we will take any valid comments into consideration and that we will refer all comments filed to the Department of State. ADAPSO is also concerned that our NPRM appears to limit the scope of comments which we will entertain, NPRM at para. 34. ADAPSO urges us to make clear that we will consider all "relevant" comments and subject them to public scrutiny.

[53] For this purpose, ADAPSO would adopt the suggestion of GTE Telenet that an entity would be considered foreign owned if a foreign person or corporation owns 20 per cent or more of its stock.

[54] ADAPSO also argues that it would be "useful" to require applicants to include copies of their articles of incorporation and corporate bylaws which might disclose a relationship to, or control by, foregin nationals. ADAPSO noted that it is particularly important to ask such information of enhanced-service providers because, unlike common carriers with whom the Commission will deal on a frequent basis, the basically unregulated nature of enhanced services will mean that the Commission will have little ongoing contact with an enhanced-service, absent a complaint as to unlawful conduct on their part.

entities could enter into arrangements with communications entities in their home countries to provide service on a through basis. ADAPSO believes that, unless U.S. entities have similar access to the domestic markets of those countries, the U.S. entitites will be at a significant competitive disadvantage — and that the only way to identify potential problems is to identify any foreign-owned applicant for RPOA status.[55] Finally, ADAPSO urges us to state clearly our intent to assure compliance with international regulations.[56] To assist us in monitoring compliance, ADAPSO urges us to require all enhanced-service-provider RPOAs to provide three additional, non-periodic reports: (1) notification of any transfer of control; (2) copies of any operating agreements (or PTT refusals to grant an operating agreement); and (3) notification of a withdrawal from offering an international enhanced service.

B. Non-carrier IRUs

26. Twelve respondents[57] addressed our tentative conclusion that enhanced-service providers and other non-carrier users are eligible to purchase IRUs in submarine cables and our proposal to require owners of common-carrier cables to sell such IRUs to users at a price negotiated between them. Of these, six supported our tentative conclusion and proposals,[58] four supported voluntary sales but challenged our power to order such sales and two, while not flatly challenging our authority to order IRU sales, seek clarification of our policy and specification of procedures to protect the rights of cable owners.

27. All agree that the Communications Act does not bar users from owning IRUs in common-carrier cables. Even those who strongly opposed required IRU sales (AT&T, RCAGC and SLCC) acknowledge that non-carriers can own IRUs. Those supporting our NPRM also agree with our tentative conclusion that such a policy would serve the public interest by increasing customer choice, reducing user costs for communications services and

[55] ADAPSO also argues that the United States should withhold RPOA status from a foreign-owned enhanced-service provider unless its home country extends similar treatment to U.S. entities.

[56] The Department of State states that we must "continually monitor" our policy to assure that enhanced-service providers comply with the international regulations.

[57] The Ad Hoc Committee, ARINC, the Networks, AT&T, CCTU, GTE Telenet, HTC, ITTWC, RCAGC, SLCC, TRT (reply) and U.S. Telecom.

[58] GTE Telenet supports sales of IRUs to enhanced-service providers, but takes no position on sales to other users.

exercising a downward pressure on the rates for leased-channel service.

28. The central issue addressed by the respondents is the lawfulness, and to a lesser extent the wisdom, of a policy forcing carriers to transfer IRUs to users. ARINC (the chief proponent of user IRUs) argues that requiring IRU transfers to users falls within the current condition on cable circuits allowing the Commission to reassign ownership of cable circuits among U.S. carriers. ARINC thus challenged AT&T's view that forced IRU transfers constitutes a taking of private property under the Fifth Amendment. ARINC also asserts that we have already held the transfer of IRUs to be a common-carrier activity governed by Title II of the Communications Act.[59] ARINC, accordingly, takes exception to the statement in our NPRM that IRU transfers to users are "not fundamentally a common-carrier activity."[60] ARINC believes that we based our conclusion on two factors — that the transfer here is between a carrier and a user and that the transfer is in the form of a lump-sum payment rather than the more traditional tariff lease — and that the conclusion is erroneous. First, ARINC argues that there is nothing about transfers of IRUs to users which would differentiate them from transfers to carriers or which would otherwise remove the transaction from our Title II scrutiny.[61] ARINC argues that the identity of the acquirer (user or carrier) does not alter the nature of the transaction (the transfer of a carrier's IRU) or the applicability of Title II of the Communications Act.[62] Second, ARINC argues

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[59] *Mackay Radio and Telegraph Co.*, FCC 64-41, Mimeo 45269, adopted January 22, 1964. ARINC notes that we there required AT&T to sell IRUs to other carriers "on reasonable and nondiscriminatory terms," a requirement deriving from Sections 201 and 202 of the Communications Act, and that one of the required reasonable terms was a sale at net book price.

[60] FCC 85-369, para. 40, n. 34. ARINC devotes much of its comments to an argument that sales of IRUs to users should be at net book price. GTE Telenet and CCTU support ARINC's arguments for net book price.

[61] ARINC also notes that we have held, for most purposes, that users and other common carriers should be treated alike. ARINC Comments at 7-8, citing MTS/WATS Market Structure, 93 FCC 2d 241, *recon.* 97 FCC 2d 682 (1983), *further recon.* 97 FCC 2d 834, *aff'd sub nom.* NARUC v. FCC, 737 F. 2d 1095 (D.C. Cir. 1984), *cert. denied* 105 S. Ct. 1224 (1985).

[62] ARINC also notes that one of the factors we take into consideration in reviewing sales of IRUs between carriers is the impact the transfer will have on the rate base of the acquiring carrier — one of the reasons we specify that such sales are to be at net book price. ARINC Comments at 7, note 15. ARINC then argues that it would be "anomalous" for us to hold that the mere fact that a user does not have a rate base would transform the sale of an IRU to a user from a common-carrier to an unregulated activity. *Id.* at 9. GTE Telenet seeks a clarification that our reference to rate base in the NPRM does not indicate that the "carriers" who are not rate regulated (non-dominant carriers or

that we have never held that common carriage requires a lease rather than a sale. Indeed, ARINC notes that the transaction we declared in *Mackay* to be common carriage was itself a sale. Finally, ARINC notes that the purpose of the Title II of the Communication Act is to protect users, not carriers, and that it would therefore be strange for us to hold that a sale of an IRU to a carrier is common carriage subject to the strictures of Title II, but that a sale to a user is not.[63]

29. AT&T and HTC, on the other hand, argue that the carriers' cables are private property, notwithstanding their having been devoted to the provision of common-carrier communications services. As a result, AT&T believes that a policy of forced IRU sales constitutes a taking of property cognizable by the Fifth Amendment and beyond our power to order.[64] AT&T acknowledges the tentative conclusions in our NPRM that the Fifth Amendment permits the government to take private property when such taking is in support of valid "public purposes" so long as the owner receives "just compensation." Further, AT&T accepts that under appropriate circumstances, the government may lawfully take property from one private entity for the use of another private interest. AT&T, however, argues that our policy would constitute "eminent domain" and that Congress has never granted us eminent domain power.

30. AT&T asserts that eminent domain is an extraordinary intrusion into the rights of property owners which the courts have narrowly construed and that they recognize such a power in regulatory bodies only where the bodies have an express delegation of eminent domain authority. Therefore, while AT&T acknowledges that the United States government, as a sovereign,

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enhanced-service providers) would be required to acquire IRUs at a price other than net book price.

[63] ARINC also argues that the sale of IRUs to users would meet the test of common carriage enunciated in *NARUC I*, 525 F. 2d 630 (D.C. Cir.) *cert. denied*, 425 U.S. 992 (1976). ARINC states that the court there held that a common carrier is one who either elects to hold out it services indiscriminately to the public or one who is legally compelled so to do. ARINC agreed that the cable owners do not now offer cable IRUs to the public, but argues that our proposed policy would compel them to do so and, thus, would meet the second of the *NARUC I* tests. ARINC also argues that IRU sales meets the third test in *NARUC I* — whether there is a public-interest reason to require cable IRUs to be offered on a common-carrier basis. ARINC finds such a public-interest reason in the need to protect users from the carriers' monopoly control over access to cables.

[64] SLCC supports the carriers arguments concerning our lack of authority to force them to sell IRUs to users. SLCC also argues that we lack any Title I or Title II authority over non-carrier purchasers of such IRUs, citing *GTE Service Corp. v. F.C.C.*, 474 FCC 2d 724 (2d Cir. 1973).

has the power to take carrier property, Congress has never expressly delegated that authority to this Commission. AT&T also asserts that courts have consistently refused to allow regulatory agencies to infer eminent domain power, citing *Hooe v. U.S.* 218 U.S. 322 (1910); *U.S. v. North American Transportation and Trading Company*, 253 U.S. 330, 333 (1920). AT&T thus argues that our reliance upon *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321 (1984), is misplaced, since it believes the issue is not whether the U.S. government has eminent domain power, but whether Congress has delegated that power to the Commission.[65]

31. AT&T finds the lack of eminent domain authority in the Communications Act unsurprising, since it believes that the Act was intended to provide a scheme for regulating the conduct of carriers in providing communications services, rather than for displacing the carrier altogether and selling its property to users. Nor, believes AT&T, can eminent domain authority be inferred from the Commission's "ancillary" powers to regulate carriers in the public interest. AT&T argues that the test for an "ancillary" power is whether that power is essential to the performance of the Commission's statutory responsibilities, citing *Midwest Video Corp. v. FCC*, 571 F. 2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979). AT&T believes that the power to force IRU sales cannot be regarded as essential to the Commission's statutory responsibilities — rather it believes that we have "other sound and lawful devices to achieve [our] regulatory objectives."[66] Finally, AT&T argues that we cannot use our power to condition cable authorizations to expand our statutory authority, or to accomplish indirectly what we cannot do directly. Rather, AT&T argues that we may impose conditions only to accomplish statutorily-authorized objectives and only then upon a proper public-interest finding. AT&T thus argues that even if we could lawfully condition a cable authorization to require sales of IRUs to users, such a condition would require an affirmative finding that the public interest requires such sales. AT&T states that we have

[65] The *Midkiff* case upheld orders of the government of the State of Hawaii breaking up large land holdings and selling parcels thereof to owners of houses built on the land.

[66] AT&T enumerates a number of alternatives we have already tried: promotion of competition through reduction of barriers to entry; removal of the voice/record dichotomy; permitting independent ownership of earth stations; introducing non-carrier cables in the Atlantic; and authorizing independent satellite systems. AT&T also notes that we can employ our authority to investigate and set carrier rates.

neither imposed such a condition nor made the requisite public-interest finding.[67]

32. The carriers also argue that, irrespective of the legal issue, our policy of forced IRU sales will fall on policy grounds. AT&T, for example, argues that the benefits we cited for our proposed policy are mistaken, exaggerated or highly speculative. AT&T believes that private IRUs will not reduce user costs or exercise a downward pressure on leased-channel rates, but that they are more likely to raise the cost of leased-channel service. AT&T believes that only large, high-volume users of communications services are likely to seek private IRUs. AT&T notes that leased-channel service is concentrated, with a few large users accounting for a substantial portion of all leased channels in use. If those entities shift to private IRUs, AT&T argues that the remaining customers will bear a larger portion of general and administrative expenses and that, as a result, rates might go up rather than down. AT&T also challenges the statement in our NPRM that private IRUs would not affect services other than leased-channels. AT&T notes in this connection that there is a growing scarcity of IRUs on "key routes" and that forcing sales of private IRUs could divert cable circuits from MTS use and raise its cost of service for MTS.[68] AT&T also notes that we failed to address the "cross elasticity" of private IRUs and MTS, but did not explain what it meant thereby. Finally, AT&T challenges our statement that the carriers have "absolute control" over access to cable circuits (thereby justifying our intervention to require IRU sales). AT&T, rather, argues that we have a substantial voice in who may own and use cable facilities and that, because of intermodal competition, the carriers are constrained in their ability to set rates for cable-based leased channels.[69]

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[67] AT&T notes that the TAT-8 authorization did not contain a forced-sale condition — only a statement that the authorization would be subject to the outcome of this proceeding. Thus, AT&T argues that the TAT-8 owners cannot be said to acceded to the requirement to sell IRUs to users, simply because they have proceeded to construct the cable, since they were unaware at the time they exercised the authorization of such a duty.

[68] RCAGC reiterates an argument it had raised in response to our Notice of Inquiry that allowing users to buy IRUs in newer, less costly cables would be unfair to carriers (and their other customers) who would be left with the older, more expensive cables. RCAGC disagrees with the view in our NPRM that users might also seek IRUs in older cables if priced appropriately. RCAGC argues that older cables are so costly *vis a vis* new ones that they are "virtually unmarketable."

[69] RCAGC also seeks a finding that our requirement to sell IRUs would apply only to AT&T and not to other, "non-dominant" carriers.

33. AT&T also finds our proposal to limit the requirement to sell IRUs to two years wrongly timed and unproductive.[70] AT&T notes that the policy could yield benefits.[71] AT&T notes that before 1988 the only cable in the Atlantic with unactivated circuits is TAT-7. Due to what it terms a shortage of TAT-7 circuits, which it believes will make overseas PTTs reluctant to agree to sales to users, it finds little likelihood that our policy would be implemented.[72] AT&T argues that the only time our policy would make sense will be in the years after 1988 and the introduction of TAT-8, but that users will then have other options such as space segment from Comsat, non-carrier cables and alternative satellite systems and there would appear to be little need to require IRU sales. Finally, AT&T believes that our goals of increased flexibility and lower costs for leased-channel users can better be achieved through less coercive means such as increased inter-carrier competition.[73] If private IRUs makes sense, AT&T argues, the market will make such IRUs available, but without the intrusive coercion and artificial prices which will be entailed by forcing IRU sales. AT&T in fact finds such a coercive policy inconsistent with the trend of most of our recent regulatory actions which have sought to free carriers from regulatory fiat and to rely upon competition to keep rates low.

C. DNIC Assignment

34. Twenty-seven respondents addressed the issue of a DNIC-assignment policy. Of these, thirteen support our tentative conclusion that we should require DNIC sharing,[74] with most

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[70] ITTWC asks us to clarify what procedures would be used to implement our policy: would a user file an application with the Commission; would uniform contract terms be required? How are carriers to reacquire IRUs if a user defaults on payment of maintenance charges? HTC seeks a limit on the time in which a user must conclude an agreement with the PTT.

[71] AT&T notes that, since ARINC filed its request for IRUs, the entry of MCI and Sprint into the international MTS market has greatly increased the demands for Atlantic cable circuits. AT&T notes that it has transferred IRUs in more than 500 voice-grade circuits to competitive MTS and other carriers and that, at the time of its pleading, requests were pending for the transfer of 150 more IRUs.

[72] HTC emphasizes that, if we decide to affirm our proposed policy, we must make PTT approval a precondition to negotiations for transfer of an IRU. Otherwise, a circuit might be tied up for long periods and of no use to anyone.

[73] AT&T argues that our proposed policy of forcing IRU sales could even jeopardize the success of the separate cable and separate satellite systems. AT&T argues that, to the extent users acquire IRUs in carrier cable systems before the separate systems are introduced, there will be fewer potential customers for the separate cable and satellite facilities.

[74] ADAPSO, Ameritech, ARINC, AT&T, Bell Atlantic, BellSouth, Equatorial,

advocating a combination of the RBOC regional DNIC (Option 5) and the USTA nationwide DNIC (Option 4) proposals. Six respondents, however, argue that there is now no evidence of a DNIC shortage or need to require DNIC sharing — some even argue that we need not limit providers to one DNIC.[75] None of the respondents supported the marketplace assignement procedures (Option 2) or the proposal to create national DNICs (Option 3). None of the respondents, favored the integrated numbering plan (Option 6), but GTE Telenet proposed a variant thereon which it believes will avoid routing ambiguities, *see* para. 47, *infra*. Finally, three respondents argue that there is not enough information in the record on which to adopt a final DNIC-assignment policy and urged us to refer the matter to the T1 Committee for further study.

1. Need for a formal DNIC policy

35. Most of the commenters agree that the number of data networks in the United States with a need for a DNIC is likely to exceed the number of DNICs available. The commenters also reiterate the view that DNICs are necessary even for networks with purely domestic networks.[76] As a result, these commenters argue that the Commission cannot continue to assign DNICs on a first-come, first-served basis, but must now begin to conserve DNICs for future uses and futurre entities.[77] The Ad Hoc Committee, Compuserve, FTCC, GEISCO, Graphnet and WU, however, argue that there is no evidence of a shortage of DNICs and no reason now to depart from *ad hoc* DNIC assignment. The proponents note that to date the Commission has assigned only about 40 of the 200 available DNICs. These entities express particular concern over our proposal to require networks to share DNICs and argue that the structure of their networks will not

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ITTWC, RCAGC, SNET, Southwestern Bell, USTA and U.S. Telecom.

[75] We indicated in our NPRM that there are eight entities (Western Union, WUI, ITTWC, RCAGC, GTE Telenet, Graphnet, TRT and FTCC) to whom we have assigned more than one DNIC — one of whom holds five DNIC assignments. *See* FCC 85-369, para. 73, n. 67.

[76] MCII, however, argues that domestic networks which do not have their own interexchange or overseas facilities (*i.e.*, the exchange telephone companies) do not need a DNIC but can rely upon the NTN as they do for telephony.

[77] USTA states that we should assume that the United States will not be able to obtain more than 200 DNICs. For this reason, USTA also argues that it is vital for us not to assign all available DNICs for current uses but to reserve some DNICs for future networks and services whose identities we do not yet know.

permit them to share DNICs.[78]

36. A number of respondents suggest that we could get additional DNICs out of the currently available DCCs by using letters of the alphabet and symbols (such as &, @, #, etc.) as well as numbers for the fourth or network digit of a DNIC, and thereby forestall the need to require sharing. That is, they argue that we could assign DNICs such as 319A, 319B, 319C, 319#, 319@, etc., as well as DNICs such as 3190, 3191, 3192, 3193. Using just the letters of the aphabet, the proponents note that we could get 26 additional DNICs out of every DCC (or 520 DNICs out of the 20 contiguous DCCs we now have available). The proponents note that the use of alphabetic and symbolic characters as network identifiers is not forbidden by Recommendation X.121.

2. Notice of Proposed Rulemaking Objectives

37. USTA agrees with several of the objectives we set out in our NPRM that we believe a data-numbering plan must meet (what is characterized as our "must objectives"), but is concerned that some may be too restrictive or unnecessarily dictate network design. For example, USTA believes that our third objective (that a DNIC-assignment plan permit routing to and from every domestic network) should be discretionay rather than mandatory. USTA observes that not every network or user needs or wants universal interconnection and that there are ways other than the DNIC-assignment process to achieve successful routing between networks. USTA also finds our fourth objective (that customers be allowed to choose their own exchange and overseas carriers) too restrictve. While it acknowledges free customer choice as a worthy principle, USTA believes that limited interconnection may reduce network costs and allow the network provider to reduce user charges. USTA believes that some users may find lower prices more useful than a wide-ranging choice of carriers and that we should give them that option. Finally, USTA, Ameritech and Pacific Telesis question our NPRM Objective 5 (equal dialing arrangements), arguing that requiring users to dial the DNIC in all cases will unnecessarily impair network efficiency and will not promote competition.[79] They note that equal dialing, in practice,

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[78] Some of the entities to whom we have assigned multiple DNICs (because they operate more than one network) indicate that this applies also to requiring them to use only one DNIC for all their networks.

[79] In connection with both the USTA (Option 4) and RBOC (Option 5) proposals that the BOCs share one or more DNICs, GTE had objected to a proposal by

means requiring the DNIC to be dialed in every call (even within a network), irrespective of whether the dialing of the DNIC serves any operational purpose. Further, USTA finds equal dialing unnecessary, since there are only four extra digits, and argues that it would not help users, since the extra digits would be dialed automatically be a machine.[80] USTA objects to equal dialing because it believes such a requirement would burden the network with the cost of reading and transporting the unnecessary DNIC. USTA also notes that "equal" dialing arrangements might require networks which do not use the full 14 digits (DNIC + NTN) for their IDNs to renumber their subscribers so that subscribers could dial a uniform 14 digits.[81] Pacific Telesis argues that the GTE Telenet request would actually burden BOC subscribers who would be required to dial as many as 19 digits to complete an inter-LATA call while GTE Telenet subscribers may often dial as few as five digits to complete a comparable call.

38. USTA also took issue with several of the assignment objectives we characterized as desirable, including Objective 2 (that the DNIC-assignment plan minimize the number of DNICs needed). USTA asserts that a plan which uses the absolute minimum number of DNICs may not necessarily be the best or most useful plan. Rather, USTA believes we should encourage sharing but recognize that some networks need their own DNICs.[82] Second, with respect to Objective 3 (avoiding duplicative numbering of private networks), USTA argues that we should rely

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Bell Communications Research (Bellcore) that, where both the calling and called parties share the same DNIC, users not be required on inter-LATA calls to dial the DNIC of the addressee because the network switch could be programmed automatically to insert it. GTE Telenet believes that, where the called party is reachable both by a BOC network and by an interexchange carrier with its own DNIC (such as itself), this arrangement would discriminate against the non-BOC networks, since it would be easier for the user to dial through the BOC exchange than to dial the extra digits required to choose an interexchange carrier with its own DNIC. *See* FCC 85-369, para. 61, note 58.

[80] GTE Telenet, however, argues that the user must dial the extra digits. GTE Telenet also reiterates its view that the Bellcore proposal discriminates against carriers who do not have arrangements with the BOC and that we should order equal dialing. GTE Telenet notes that equal dialing is mandated in telephony and sees no exemption for data services.

[81] Recommendation X.121 sets the maximum length of an IDN (DNIC + NTN) at 14 digits, but does not require all networks to use all 14 digits.

[82] Beyond the networks with their own overseas lines, which our NPRM recognized as requiring their own DNICs, *see* FCC 85-369, para. 46, USTA argues that even domestic local exchange networks (which we concluded could share DNICs) may not wish to share a DNIC with a competitor — particularly if that competitor is the DNIC administrator and is "dominant" (such as the RBOCs) — because DNIC numbering may require networks to share sensitive competitive information.

upon the DNIC administrator to avoid duplicate numbering. With respect to objective number 4 (to minimize the number of digits a network must read) USTA believes that the number of digits a particular network switch must analyze is a question of network design which should be left to the designer, not set by regulatory fiat. USTA notes that the network will be required under any shared-DNIC plan to read six digits beyond the DNIC (the (PNIC), but that that does not mean that every node in the network must be able to translate all ten digits (*i.e.*, there can be a switching hierarchy). Finally, USTA observes that Objective 7 (easy transition to an ISDN-numbering plan) is now only theoretical, since no ISDN plan exists.[83] Rather, USTA believes that the only requirements are that a DNIC-numbering plan be consistent with Recommendation X.121 and so designed as to avoid obvious conflicts with the voice numbering plan. Rather, USTA believes that a DNIC assignee should be free to develop a numbering plan within its DNIC which parallels the voice numbering plan, to design its own numbering plan or to adopt one that will allow transition to the ISDN plan.

3. Routing Ambiguities

39. Most of the comments disagreed with the NPRM that routing ambiguities are likely to be a serious problem which we must avoid. While all agree that routing ambiguities can occur whenever multiple networks share a DNIC,[84] most do not expect ambiguities to be a significant problem and agree that we can reasonably rely upon the market to resolve the problem. Certainly, they do not find the problem worth the cost of mandated, universal interconnection. Rather, they believe that competition will force network providers to undertake all necessary interconnections.[85] USTA, for example, notes that interexchange carriers (particularly

[83] The acronym ISDN, or integrated services digital network, refers to a communications network, using digital transmission techniques, which is capable of providing a wide variety of voice and data services. Standards for a worldwide network of compatible ISDNs are under development in various study groups of the CCITT and under the overall direction of Study Group XVIII.

[84] U.S. West notes that routing ambiguities can occur even where a destination has its own individual DNIC — if the destination network is not connected to the interexchange carrier to which the originating network has handed the call.

[85] U.S. West cites the example of introducing competition into MTS. U.S. west observed that at first the competitive long-distance carriers did not interconnect with every local exchange carrier. However, U.S. West argues that the market demanded such ubiquity and that competition forced the competitive entities into an extensive program of interconnection.

those with overseas lines) will be under pressure to provide a comprehensive service and will thus seek interconnection with as many exchange networks as is economically or operationally feasible.[86] Similarly, USTA asserts that exchange networks will be under competitive pressure to offer wide access to avoid losing customers to other, more widely interconnected networks.[87] The comments recognize that some routing ambiguities could occur where exchange networks decide not to enter into wide interconnection. However, they believe that any incomplete calls will be infrequent and avoidable only by forced universal interconnection — a course they speculate may be beyond our power to order and one whose cost is certainly out of proportion to the severity of the problem. Only GTE Telenet argues that we must absolutely avoid routing ambiguities and proposes an additional DNIC-assignment plan which it believes will accomplish that goal. *See* para. 47, *infra.*

4. Need for a Uniform Domestic Numbering Plan

40. A number of the commenters addressed the NPRM proposal to create a uniform domestic DNIC-numbering (or PNIC-assignment plan) as an adjunct to shared DNICs. Most support the need for a uniform plan and the proposal to adapt the North American [Telephone] Numbering Plan (NANP) for this purpose.[88] They believe the NANP would be workable for data services as well as telephony and agree that the fact that the features of the NANP are well known would simplify and expedite implementation of a shared-DNIC policy.[89] AT&T, on the other hand, argues for a different PNIC-assignment plan. AT&T proposes that we assign each network sharing a DNIC a block of 1000 PNICs in the form "ABCXXX," in which ABC represents a number unique to each service provider in each LATA, and XXX represents the

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[86] USTA notes that U.S. overseas carriers represent to PTTs that they can handle all traffic destined to the United States and would thus be required by their contracts either to connect with all U.S. exchange data networks or with such U.S. domestic interexchange carriers who do. USTA argues that this fact will sharply reduce the incidence of incomplete calls.

[87] Alternatively, USTA notes that some exchange networks may elect to avoid costs of multiple interconnection and attract customers who do not need wide interconnection through lower charges or greater security.

[88] By analogy to the NANP, a PNIC for data services would take the form NXX + YXX, in which the first three digits (NXX) would be equivalent to the telephone "area code" (which is called under the NANP the "numbering plan area" or NPA) and the second three digits (YXX) would be equivalent to the three-digit telephone "central-office code."

[89] U.S. West agrees on the need for a uniform domestic numbering plan, but does not propose any particular plan. *See* para. 51, infra.

1000 digits from 000 to 999, inclusive. AT&T asserts that PNICs of this form would allow networks to route traffic to each RBOC in each LATA by means of the first seven digits (the DNIC + ABC), rather than requiring the switch to read 10 digits (the DNIC plus a six-digit PNIC) under the NANP.

41. USTA and GTE Telenet, on the other hand, see no need for any uniform domestic numbering plan. USTA notes that the only asserted reason for requiring a uniform numbering plan is the need under Recommendation X.121 to assign unique IDNs. However, USTA believes that the need for a unique IDN does not mandate a uniform numbering plan. USTA notes that an IDN is composed of a DNIC plus an NTN. Thus, USTA argues that, so long as the DNICs in front of the NTN are different, the two IDNs would be unique, even if the NTNs following them were identical.[90] Rather, USTA believes that the administrator of each shared DNIC (or the operator of a network with its own separate DNIC) should be free to develop its own numbering plan.

5. NPRM Options

42. *Option 1 — First-Come, First-Serve.* Most of those filing comments agree with our NPRM that the number of applicants for DNICs will quickly outstrip the number available and that we cannot continue to assign DNICs on an ad hoc basis as we received applications. Several respondents, however, see no evidence of a DNIC shortage and argue that we should continue to assign DNICs on an ad hoc basis.

43. *Option 2 — Marketplace Procedures.* As was the case in response to our Notice of Inquiry, none of the respondents favored use of auctions or lotteries to assign DNICs.[91] The respondents continue to believe that an auction would unfairly favor those with the most money to pay for a DNIC and that a lottery would not assure that DNICs go to those who can make the best use of them. They also observe that use of an auction

[90] USTA also argues that there is no reason to require all U.S. networks to assign NTNs of 10 digits. USTA argues that there is need for uniformity only within the subscribers and networks sharing a common DNIC. GTE Telenet states that it does not oppose the BOC proposal to use 10 digits for their customers but asserts that other DNIC assignees should be free to select another format.

[91] In our Notice of Inquiry we had put out for comment a proposal to rely upon an auction or lottery to distribute DNICs and to allow free resale and transfer thereof. We noted that such an approach would replace subjective judgments of need for a DNIC with objective price criteria and assure that DNICs go to those with the greatest use for them. *See.* 95 FCC 2d at 653.

would require amendment of the Communications Act.

44. *Option 3 — National DNIC.* Most of the commenters find no merit in the concept of national or domestic DNICs.[92] Most argue that national DNICs as defined in the NPRM would violate Recommendation X.121, since X.121 reserves the digits 0, 1, 8, and 9 for other uses. They also question the value of such an approach in practice — since, as the NPRM observed, a network seeking to offer international service would need to shift to a DNIC under Recommendation X.121. Some parties, however, believe that a variant of the national DNIC, using letters and symbols with existing U.S. DCCs, might be workable and help avoid a shortage of DNICs. *See* para. 36, *supra.*

45. *Options 4, 5 and 6 — Shared DNICs.* The majority of those filing comments agreed that we should adopt a DNIC-assignment plan which provides for sharing of DNICs. There was no agreement, however, on any of the specific NPRM options. The majority prefer a combination of Options 4 (the USTA) and 5 (the RBOC) proposals under which we would assign a DNIC to each of the seven RBOCs, who would agree to share their DNIC with any other network in their service area, and one to USTA to be shared by those networks who do not wish to share an RBOC DNIC. The respondents opposed either Option 4 or Option 5 as an exclusive approach. They find Option 4 too restrictive because a nationwide DNIC would include no domestic routing information in the DNIC and require all switches to read more than the DNIC (*i.e.*, to read the DNIC and the PNIC).[93] They also believe that the large number of networks sharing a nation-wide DNIC could increase the chance of running out of PNICs and would limit the number of closed user groups (CUGs) which could be implemented.[94] The

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[92] Our NPRM had indicated (at para. 55) that we might supplement the number of available Recommendation X.121 DNICs with a series of national, or domestic, DNICs for use by networks which operate solely within the United States. We defined such national DNICs as four-digit codes starting with the digits 0, 1, 8, or 9. These numbers were selected because DCCs under Recommendation X.121 use only the digits 2-7. As a result, such a national DNIC would not be recognized by an overseas switch, but could be used within the United States for routing domestic calls.

[93] USTA asserts that this is not a realistic criticism, since it believes that, no matter what sort of shared-DNIC assignment plan we ultimately require, all networks will be required to read 10 digits: the DNIC plus six-digit PNIC. USTA also states that U.S. overseas carriers with unrestricted operating agreements will be required also to provide 10-digit translation or to connect with domestic interexchange carriers who do.

[94] The term closed user group or CUG refers to a group of subscribers to a data network who are allowed to communicate with each other but who are restricted from communicating with others. CUGs are identified by the DNIC of the host network plus a unique 16-bit "interlock code" as a way to enforce

proponents believe that Option 5 will be more flexible, allowing more numbering spaces and a large number of CUGs. The proponents also argue that the use of seven regional DNICs would simplify the task of network interconnection — although they agree that interconnection should be voluntary even under a regional-DNIC approach.

46. All of the respondents opposed Option 6, the integrated numbering plan, as drafted. The chief objection is that the proposed plan would use at least 164 DNICs (one for each of the RBOC LATA.[95]) and thus would virtually exhaust all DNICs at the outset with none left for future use. The opponents find no routing benefit to a plan of one DNIC per LATAs. That is, they argue that it will still be necessary to read the PNIC to differentiate particular networks. The opponents also note that the major benefit cited for the proposed plan (the relatively small size of LATA and the benefit that that might have in reducing the number and cost of interconnections required to avoid routing ambiguities) is overstated or erroneous. They assert that even the smaller regions could require substantial numbers of interconnection. AT&T, indeed, argues that the multiple interconnections in each of the 164 LATAs could be more expensive for small service providers who operate in several LATAs than the one interconnection required in each RBOC region. More importantly, the commenters argue that the possibility of routing ambiguities is not so threatening as to justify the requirement for universal interconnection. As a result, the opponents see no need to undertake the cost and lack of flexibility of the integrated numbering plan.

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the CUG restrictions. Due to the technical standards for creating packet-switched data networks, such networks can accommodate a maximum of 65,535 unique 16-bit codes. With one nationwide DNIC there would be a limit of 65,535 CUGs throughout the country, but with seven regional RBOC, DNICs plus one nationwide USTA DNIC, there could be 65,535 CUGs for each of the eight DNICs or 524,280.

[95] The term LATA of "Local Access and Transport Area" refers to the geographical area in which the divested companies are permitted to offer services. At present there are 164 recognized BOC LATAs. In addition there are 29 local service areas served by telephone companies other than those operated by the BOCs which are roughly equivalent to a LATA. The commenters note also that Option 6 did not provide for the 29 independent areas and that each of them would appear also to require a separate DNIC.

[96] GTE Telenet states that private networks should share the DNIC of the public network to which they are attached.

47. GTE Telenet proposes that we allocate DNICs to public data networks[96] who demonstrate that they cannot share a DNIC and need their own.[97] This would mean that we would assign a separate DNIC (1) to each BOC LATA; (2) to each independent service area not associated with a LATA;[98] and (3) to each value-added network (VAN), interexchange carrier or international record carrier (IRC) operating one or more public networks. This would require, according to GTE Telenet, "a few hundred" DNICs broken down as follows: 170 BOC LATAs, 30 independent local marketing areas, and perhaps up to 100 interexchange VAN/IRC networks. GTE Telenet believes that the approximately 100 additional DNICs (over the 200 referred to above) its plan would require could come from the approximately 680 DNICs not allocated in Zone 3.

6. DNIC-Assignment Administrator

48. There was a wide range of views on our NPRM proposal to have the T1 Committee administer the DNIC-sharing plan. AT&T, for example, without specifying any particular entity, agrees that administration should be in the hands of an independent, voluntary organization such as USTA or ECSA, rather than one of the RBOCs who will also use the DNICs for their business. The RBOCs, however, all deem themselves satisfactory administrators for a regional shared DNIC — but acknowledge that some networks with which they compete might prefer to share the DNIC administered by USTA. USTA also sees no need for one administrator and asserts its suitability as an impartial administrator, ready, willing and able to assign PNICs under a DNIC assignment to it — but would leave administration of other DNICs to the assignees thereof.[99]

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[97] GTE Telenet would base the decision to grant an individual DNIC on four criteria: (1) that sharing a DNIC with another network would cause a routing ambiguity; (2) that the network must have the ability to be selected by an X.25/X.75 RPOA (transit network) selection facility/utility; (3) that the network must serve as a transit network and must be uniquely identified in the X.75 transit network identification utility field for purposes of billing and of preventing routing loops; or (4) that it cannot share a DNIC in order to create inter-network CUG interlock codes.

[98] The independent areas "associated" with a BOC LATA would share the LATA DNIC and receive traffic through the adjacent "tandem" switch just as they now do for telephone service.

[99] USTA also asks us to clarify that our reference to an independent DNIC administrator means an entity which assigns PNICs under a Commission-

49. The ECSA, the entity our NPRM had proposed as an administrator states that it cannot perform that function. ECSA notes that it is composed of volunteer members from the telecommunications industry and that its primary task is the development of technical interconnection standards for its member companies. As such, ECSA emphasizes that it is a neutral body concerned chiefly with technical questions that lend themselves to consensus and is, thus, ill-equipped to handle sensitive political questions such as whether a particular assignment would give a network a competitive advantage. ECSA believes PNIC assignment is likely to involve controversy and to place a heavy burden on ECSA member resources that will jeopardize its primary mission of setting technical standards.

7. Relation to ISDN

50. A number of respondents also commented on the statement in our NPRM that our DNIC-assignment policy should provide for a transition to the ISDN numbering plan under development in the CCITT.[100] USTA argues that such a goal is impossible, since it observes that no such plan exists. AT&T argues that it is not necessary to provide for a transition to an ISDN numbering plan, since it asserts that the CCITT standards do not contemplate requiring all packet networks to merge with ISDN networks. AT&T further asserts that the CCITT ISDN Recommendations will not require ISDN networks that provide packet services to base their numbering on Recommendation X.121, but will give them the freedom to rely upon ISDN numbering. AT&T believes that in the long run some stand-alone packet networks will survive and that they will coexist with ISDN networks. AT&T thus believes that the goal should not be to combine the data and ISDN numbering systems but to assure that packet and ISDN networks can interwork efficiently.[101] U.S. West, however, believes that it is important to assure that the U.S. domestic data-numbering plan used to implement a program of shared DNICs is

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assigned DNIC. USTA states that DNIC assignment is a duty of the government and that it would oppose any proposal for us to remove ourselves from that function.

[100] *See* CCITT Recommendation E.164, CCITT Red Book, Vol. II, Fascicle II. 2, pp. 111-18. Our NPRM indicated the view that any DNIC-assignment or data-numbering plan we develop in this proceeding should take into account the work of the CCITT on a numbering plan for the ISDN.

[101] AT&T does agree that many of the issues which have arisen in developing the DNIC-allocation rules will also be valid considerations in the ISDN environment and that the planners of the ISDN standards should include them in their analysis.

fully consistent with the evolving ISDN plan. U.S. West also challenges the view that no ISDN numbering plan exists. It notes that the participants in the ISDN process are looking at the telephone numbering plan (of which the NANP is an example) as the analogue for the ISDN plan. U.S. West further states that this is why it recommends that any final domestic data-numbering plan should look closely at the example of the NANP (and why it proposed use of the NANP for its proposed interim plan).

8. Need for Further Study

51. Three respondents (MCII, NYNEX and U.S. West) argue that the record before us is not sufficient for us to prescribe any particular DNIC-assignment or data-numbering plan for the United States. They find the question of a domestic numbering plan to be of great complexity, one which will require the balancing of a wide variety of often diverse user, service provider and manufacturing interests, and one which rests ultimately on a complex of intricate technical matters. MCII and U.S. West note that in such matters the Commission has traditionally deferred to the expertise of the industry and argue that our traditional rulemaking procedures (two rounds of written comments) are not well suited to the resolution of technical issues. Rather, all three recommend that we refer the question of a DNIC-assignment and data-numbering plan to the T1 Committee for development of industry recommendations, which we would then review, before adopting a final plan. The commenters find T1 a particularly good choice because it has broad industry membership, well defined and understood procedural rules, a reputation for impartiality, expertise in technical matters and experience in building industry consensus. U.S. West also notes that T1 is now considering a numbering plan for ISDN, where many of the issues we are addressing in this proceeding are also relevant, and that the best way to assure that the data and ISDN numbering plans are consistent is to refer both questions to the same body. U.S. West and MCII assert that the time required for industry study need not unduly delay DNIC assignment and that having the industry work out the problems could end up expediting implementation of data networks. To guide the deliberations of T1, the comments urge us to set broad policy guidelines (including re-affirmation of

the DNIC-plan objectives we set out in the NPRM).

52. Each of the three commenters, however, takes a different view as to what course we should follow while the industry is studying the plan. MCII argues that local data networks (such as exchange telephone networks used for data services) who do not have their own interexchange or overseas lines do not need DNICs but can rely upon the DNIC or the interexchange carriers. Thus, MCII would have us hold DNIC assignments to such networks (including the BOCs) in abeyance until T1 acts and assign DNICs (on an *ad hoc* basis) only to networks with interexchange and overseas lines. The two RBOC respondents, however, argue for an interim DNIC-assignment plan, but disagree on its features. NYNEX proposes (1) adoption of a combination of Option 4 and 5 from the NPRM; (2) use of the NANP for PNIC assignments; and (3) assignment of one or more DNICs to be shared by private data networks.[102] U.S. West, however, recommends that we defer action on the USTA or RBOC proposals and develop an interim plan with the following features: (1) set aside one or two DNICs for new public data networks to share; (2) set aside one or two other DNICs for private networks to share; (3) require PNIC-numbering based on the NANP; and (4) set aside a small number of DNICs to be assigned to networks with overseas lines.[103]

IV. DISCUSSION

53. After reviewing the pleadings filed in this proceeding, we have decided, with one exception, to affirm the policy proposals in our NPRM. We again find that U.S. enhanced-service providers are eligible under the ITU Convention for designation as RPOAs and that such designation may assist them in obtaining necessary operating agreements. We continue to believe that RPOA designation can be voluntary and that it need not entail a cumbersome, adversarial accreditation procedure. We have also decided to affirm our tentative conclusion that we cannot continue to assign DNICs on an *ad hoc* basis, but that we must require networks who can do so to share one or more DNICs. After reviewing the

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[102] NYNEX states that private networks should be free to use the NANP to develop their own numbering plan.

[103] In their reply comments several respondents challenged specific aspects of the U.S. West proposal. After reviewing these comments we conclude that they have misinterpreted the U.S. West proposal and that their criticism have no merit. We thus find no need to consider the unauthorized pleading that U.S. West filed seeking to answer the comments. We shall, therefore, dismiss the U.S. West pleading and the BellSouth pleading seeking the right to answer it.

comments in this proceeding, we shall order a combination of the RBOC and USTA proposals (seven regional shared DNICs plus one nationwide shared DNIC) but shall not order a final domestic data-numbering plan. Rather, we shall refer the question to the T1 Committee of the ECSA for further study.

54. With respect to the issue of non-carrier cable IRUs, we again find that non-carriers users are eligible to hold private IRUs and that the public interest will be served by allowing such capital acquisition. We encourage users and carriers to negotiate IRU transfers, but have decided at this time not to require them. We believe that implementation of *Authorized User II*,[104] the introduction of separate-satellite systems[105] and, most particularly, the introduction of non-carrier cables which are designed particularly to meet the needs of end users will provide many of the benefits we see from private IRUs, without the need for coercive measures. We shall, however, monitor developments in the international market and will revisit the need to require IRU transfers if that appears necessary or desirable.

A. RPOA Designation

55. Turning first to the issue of designating enhanced-service providers as RPOAs, we again that enhanced-service providers are eligible for RPOA status. To the extent that formal U.S. government recognition of enhanced-service providers will reassure PTTs that U.S. enhanced-service providers will obey the ITU regulations, and thereby assist U.S. enhanced-service providers in obtaining operating agreements, we believe the policy will serve the public interest. However, because we believe that RPOA designation chiefly entails a credible pledge on the part of the RPOA to obey the international regulations, we find no need for a cumbersome, adversarial procedure for RPOA designation. Rather, we believe that the Commission and the Department of State can obtain the information we need to designate RPOAs by means of a simple application process such as we proposed in our NPRM. As a result, we shall, with a few slight modifications discussed below, adopt as a final rule the proposed application form

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[104] Proposed Modification of the Commission's Authorized User Policy Concerning Access to the International Satellite Services of the Communications Satellite Corporation, (Second Report and Order), 100 FCC 2d 177 (1985), *recon. denied* FCC 85-373, *appeal docketed sub nom.*, WUI v. FCC, No. 81-1202 and consolidated cases (1985).

[105] *See, e.g.*, Establishment of Satellite Systems Providing International Communications, FCC 85-399, 50 Fed. Reg. 42266 (1985), *reconsid. grtd in part*, FCC 86-144, Mimeo 36563, released April 17, 1986.

included as an appendix to our August 19, 1985, NPRM. The amended text is set forth in an Appendix to this Report and Order.

56. *Eligibility.* We continue to believe that some enhanced-service providers meet the criteria for designation as RPOAs under the ITU Convention: That is, we find that an enhanced-service provider who offers an international "public correspondence," or message service, and who undertakes the obligations of Article 44 of the Convention may be designated as an RPOA. We thus affirm our tentative conclusion that a U.S. RPOA need not hold a "license" as a "common carrier." As we have previously noted, the concept of a common carrier is a creation of U.S. law which has no legal significance outside the United States. Rather, we continue to believe that the use of the term "private operating agency" in the RPOA definition was intended to describe any private communications entity operating subject to oversight by an itu member — to differentiate such an entity from an "administration" which is a communications entity operated by a national government.[106] Whether a particular government chooses to call such a private agency a "common carrier," an "enhanced-service provider" or some other name, is an internal matter within the discretion of that government. It is also within the discretion of that government to subject its RPOAs to pervasive rate and facilities regulation, to "streamline" such regulation or to rely upon market forces to assure reasonable rates. The crucial fact that distinguishes an RPOA from other private entities is that it

[106] While the specific term "RPOA," and its definition, was added to the Convention in 1947, some form of the RPOA concept (that is, a private entity offering communications services under the "recognition" of its government) has existed since the first International Telegraph Convention signed in Paris, France, in 1865. That Convention required signatories to impose their obligations upon "compagnies concessionaires" or, in English, private enterprises who hold a concession to offer service within such members' borders. *See* 56 British and Foreign State Papers 294, 310. *See also* 59 *id.* 322, 336 (Vienna, 1868); 66 *id.* 975, 991 (Rome, 1872); and 57 League of Nations Treaties Service 212, 219 (St. Petersburg, 1875). The term "private enterprises" was also used in the three International Radio-Telegraph Conventions. *See* 1 TIAS 556, 557 (Berlin, 1906); *Id.*, 883, 884 (London, 1912); and 2 TIAS 683 (Washington 1927). In 1932 the separate Telegraph and Radio-Telegraph Conventions were replaced with the first combined International Telecommunication Convention, 3 TIAS 65 (Madrid, 1932). The 1932 Convention (as well as the six succeeding Telecommunication Conventions) replaced the term "private enterprises" with the term "private operating agencies." *See id.* at 69. Since the United States was not a party to any of the Telegraph Conventions, it is clear that the provisions therein for private entities were not aimed at U.S. common carriers. Even the 1932 Convention predates the Communications Act (1934) and thus was not aimed at U.S. "common carriers."

has been "recognized" by its government.[107] That is, the government has formally imposed (and the RPOA has formally undertaken) that government's obligations under Article 44 of the Convention. As a result, we conclude that the United States is free under the Convention both to determine what classes of service providers may validly operate within its borders and to which of those providers it will extend RPOA status. The United States, in exercising its sovereign rights under international law, has decided to rely for its communications and information services upon three classes of service providers: (1) common carriers, licensed under Section 214 of the Communications Act and rate regulated under Sections 201-205; (2) "non-dominant" common carriers which are licensed but not pervasively regulated;[108] and (3) unlicensed and non-rate-regulated "enhanced-service" providers.[109]

57. In reaching this conclusion, we thus affirm our tentative conclusion that the term "public correspondence" used in the definition of an RPOA does not equate to "common carriage" as that term is understood under U.S. law. The definition of public correspondence as a "telecommunication which the offices and stations must, by reason of their being at the disposal of the public, accept for transmission" is somewhat arcane. While the language appears to suggest some concept of service to the public, we find no evidence that the members of the ITU there by intended to incorporate into the Convention the U.S. concept of common carriage.[110] Rather, we believe that the term should be

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[107] Although Article 44 refers to a private operating agency "authorized" by a member, the word "authorized" does not refer to a license under Section 214 of the Communications Act. Rather, we read the term "authorize" to refer to any process a particular country uses to designate private entities which operate subject to that government's oversight.

[108] *See* International Competitive Carrier Policies, FCC 85-585, 50 F.R. 48191 (November 22, 1985).

[109] The mere fact that an enhanced-service provider is not rate regulated has no bearing upon its eligibility to be designated as an RPOA. The United States has designated its commercial television networks as RPOAs (because they offer a broadcast service capable of causing harmful interference), but has never subjected them to rate regulation. Applicability of Title II of the Act is also apparently not determinative of eligibility for RPOA status. Neither ARINC nor the networks is a common carrier or subject to Title II. Rather, ARINC is a user group which performs U.S. duties under international regulations and the networks are licensed under Title III of the Act.

[110] The term "public correspondence" describes services that in fact are offered to the public. It does not dictate what kind of services ITU members can permit or the entities they can "recognize." It does not, for example, mean that the United States is barred from designating as an RPOA a common carrier which was not in existence at the time the definition was adopted. It also does not preclude ITU members from introducing new services that were not in

interpreted more broadly as synonymous with the term "telecommunications"[111] and that it describes the kinds of communications that were in fact offered by administrations at the time the definition was added to the Convention — *i.e.*, those offered to third parties (the public).[112] As such, we believe it is intended to distinguish such third-party or message services, where the service provider transmits the sender's information without change in content, from the more recent phenomenon[113] of "data processing," where the provider uses a computer to manipulate and alter the content of the customer's information.[114] None of the respondents challenged our conclusion that service providers who offer pure data processing do not offer public correspondence and, thus, that such providers are not eligible for designation as RPOAs. It is only those U.S. enhanced-service providers who offer a service which acts upon the form but not the content of the customer's communication, which we in the United States call enhanced but which other nations consider telecommunications, that would qualify for designation as an RPOA.[115]

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existence on that date. Nor does it mean, as suggested by RCAGC, that the United States may not validly create new classes of service providers.

[111] With respect to ARINC's suggestion that we construe the term "public correspondence" as "transmission" rather than "telecommunications," *see* para. 20, *supra.*, we note that the Convention defines "telecommunications" as "transmission." *See* n. 44, *supra.* As a result, substituting the term transmission would not alter our construction of "public correspondence." ARINC's concern, however, arises not from our use of the word "telecommunications" but from the Convention's use of the word "public." Since we do not regard the term "public" as requiring common carriage, our approach would not exclude ARINC as an RPOA. To the extent that ARINC operates on behalf of the United States and provides aviation services that would otherwise be provided by an administration, it is properly an RPOA.

[112] We also do not read the term "public correspondence" as requiring an indiscriminate public offering. That is, we believe that if an entity offers a message or communications transport service to one member of the public, the service is a public correspondence.

[113] At the time the definitions of "administration," "POA," "RPOA" and "public correspondence" were adopted, the computer had not yet been invented.

[114] In pure data processing the communications channel is incidental to the service provided. That is, the channel is used only as an extension of the computer to a remote customer site. The service is the manipulation of the customer's data. This is why Recommendation D.1 classifies data processing as a use of a leased channel. If the lessee of the channel uses that channel to transport the customer's message from point A to point B unchanged in content, the service is the transport. Use of a leased channel for such a purpose constitutes "transmission." This is why such a person is considered as "acting like an administration" — that is, engaging in a message service — and his actions are defined as a violation of Recommendation D.1.

[115] With respect to ARINC's argument that we should avoid rigid definitions, we wish to make clear that our conclusion that data processing is not public correspondence arises from the fact that Recommendation D.1 defines it as a

58. *Certification Process.* After reviewing the comments we have also concluded, with two exceptions detailed below, to make final the voluntary, application process for RPOA certification we proposed in our NPRM. First, we continue to believe that we should make RPOA status readily available to eligible U.S. enhanced-service providers but that we should not make RPOA designation mandatory. We indicated in our NPRM that our overall objective in the area of enhanced services is to encourage competition by removing barriers to entry and unnecessary regulatory burdens.[116] We find that a policy of voluntary RPOA designation will serve that pro-competitive policy objective without any harm to other U.S. or overseas interests. As we indicated in our NPRM we believe PTTs should be free to choose whether to grant an operating agreement to a U.S. enhanced-service provider without requiring RPOA status. As we have also indicated, RPOA designation is not necessary to require compliance with the Convention and regulations; that duty is pre-existing and flows from the fact that the United States is a Signatory to the Convention and under Article 44 undertook to ensure that U.S. nationals and residents do not violate the rights of other ITU members. The lack of formal RPOA designation will not alter their obligations in any way.[117] Further, PTTs have in the past evidenced a general reluctance to grant operating agreements to

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use of a public-correspondence service (*i.e.*, leased-channel service).

[116] An example of this is membership in the CCITT. As we indicated in our NPRM, we find nothing in the Convention, recommendations or regulations which requires an RPOA to join the CCITT or the CCIT. It is clear from the Convention, however, that those RPOAs who join the CCIR or CCITT are obligated to pay a share of the costs of those bodies. For that reason, we stated in our NPRM that we prefer to leave CCITT membership optional. We recognize that CCITT membership is useful and anticipate that most enhanced-service providers who become RPOAs will join the CCITT. We simply wish not to impose a financial burden upon those who feel their interests are adequately represented by other U.S. CCITT representatives. We thus affirm our tentative conclusion not to require CCITT membership as a condition of RPOA status.

[117] We are unable to understand the argument of ADAPSO concerning the uncertainty of PTTs about which U.S. entities provide a public correspondence and which data processing, or how a mandatory RPOA status would alter the situation. An entity wishing to offer a "public-correspondence" enhanced service internationally must obtain an operating agreement. The PTTs will know, when asked for an operating agreement, the name of the entity and the fact that the service is public correspondence. If, however, ADAPSO means that the PTTS are concerned that an entity who leases a channel, under the guise of offering a pure data-processing service, may use it to carry third-party traffic in violation of Recommendation D.1, a mandatory certification process would not help. An entity intent on violating Recommendation D.1 would simply state that it is a data processor and avoid RPOA certification. The protection for the PTTs is that the United States will halt any violations by U.S. entities of which it is aware.

anyone not designated an RPOA. Thus, in most cases, the PTTs will force an enhanced-service provider to seek RPOA certification. Our policy is simply to make RPOA status easily available to any enhanced-service provider who seeks it.[118] We emphasize, however, that it is only the need to seek RPOA status that is voluntary. Whether an entity has been designated an RPOA or not, the obligation to obey the Convention and regulations is mandatory.

59. Second, we shall also make final the proposed RPOA-certification process we outlined in our NPRM. That is, we shall require applicant for RPOA status to file with our Common Carrier Bureau the application set forth in the appendix to this order. The Bureau will give Notice of the filing in its weekly notice of applications filed. We shall not provide for formal petitions to deny but interested persons who know of some disqualification of the applicant may raise such issues informally by letter. We shall review the application for completeness and any comments filed, prepare a recommendation and forward the file to the Department of State for final action. We continue to believe that cumbersome, overly formal procedures are unnecessary and that all relevant interests can be fully protected through the procedures we today adopt. Our decision to rely upon informal procedures proceeds from our desire to make RPOA status readily available to all who need it and our view that RPOA certification is not essentially adversarial. This does not mean, however, that our procedures are "automatic" or "indiscriminate." While our NPRM characterized our procedures as "relatively automatic," they in reality require affirmative action both by the Commission and the Department of State. They are also not indiscriminate. Applicants for RPOA status are required to file an application which is similar to that filed by an applicant for certification as a common carrier. We shall review the application to determine that the applicant has provided all required information. Our rules require the applicant to "verify" the information it files.[119] We

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[118] Because our policy is designated to assist enhanced-service providers to obtain operating agreements, a requirement for a prior operating agreement would be self-defeating. We do not require a prior operating agreement for common carriers seeking RPOA status — they also find PTTs reluctant to deal with them without such status. It is unlikely that anyone will go to the trouble of obtaining RPOA status needlessly, such as if it is already negotiating with a PTT for an agreement.

[119] Section 1.52 of our Rules and Regulations requires an individual not represented by counsel to sign and verify all applications and other pleadings filed with the Commission. If an applicant is represented by counsel, the rule provides that the signature of an attorney on a document itself constitutes a

will also receive information as to disqualifications through informal comments. In preparing our recommendation we shall rely upon all relevant information we have received.[120] Neither we, nor the Department of State, would "recognize" an entity clearly ineligible for RPOA status. However, we again emphasize that the important fact of RPOA certification is compliance with the ITU regulations. Our procedures will identify all entities eligible for RPOA status, formally impose them the obligation of Article 44 and extract an enforceable promise to comply.[121] If the entity fails to comply, the United States can and will order it to cease from violation and, if necessary, can revoke its RPOA status.[122]

60. *Modifications of Proposed Application.* In connection with our certification procedures, we have decided to adopt the proposed application form attached to our NPRM. However, for the reasons shown below, we shall make two modifications to the form. First, we shall accede to the request of the Department of State and will require an applicant for RPOA designation to include information as to its ownership and to include a copy of its articles of incorporation and corporate bylaws.[123] The Department of State has indicated that it needs this ownership information so that it can discharge its repsonsibilities under Article 44 and we agree with ADAPSO that it would be more efficient to require applicants to provide all necessary information

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verfication.

[120] Our reliance upon informal comments only seeks to remind those wishing to comment that the major issue in RPOA certification is a promise to obey the international regulations. If anyone knows of factors which bear upon the ability or willingness of the applicant to honor that commitment, he or she can raise it just as easily by letter as by a petition to deny. We shall forward to the Department of State any comments we receive.

[121] In addition to remedies under U.S. law, we note that foreign administrations aggrieved by infringements of the Convention and regulations may lodge a complaint under Article 50 of the Convention to invoke the procedures for settlements of disputes there set forth.

[122] We wish to make clear that our decision not to subject enhanced-service providers to pervasive regulation does not mean that they are beyond our authority. The fact that we do not rate regulate such entities does not remove them from our jurisdiction under Sections 2 and 3 of the Act, 47 U.S.C. §§ 152, 153, or relieve them of the obligation to obey the laws and treaties of the United States. We retain our authority to assure compliance therewith. Providers of pure data processing are customers of common carriers and are under tariff obligations not to use carrier services and facilities for any unlawful purpose. We can reach any violations by such entities through the carrier tariffs.

[123] For purposes of this requirement, we shall consider an applicant to be "foreign-owned" by reference to the standards set out in Section 310 of the Communications Act (generally, if 20 per cent or more of its stock is owned by a foreign person or corporation).

with their applications rather than require the Department later to solicit it. We also agree with ADAPSO that, in view of the freedom granted enhanced-service providers in the United States, it would be valuable to identify enhanced-service providers who are foreign-owned. We emphasize that our requirement for this information does not, *per se*, disqualify or restrict a foreign entity in offering enhanced services in the United States.[124] However, as ADAPSO has pointed out, a foreign-owned enhanced-service provider could take advantage of our *Computer II* policy to establish itself in the United States and enter into arrangements with its overseas parent or other entities authorized by its home government to provide "public correspondence" services on a through basis. Such arrangements could, without equivalent access within the foreign country,[125] put U.S. carriers and enhanced-service providers at a competitive disadvantage. Knowledge of foreign ownership would alert the Department of State to potential problems so that it could include appropriate conditions on its grant of RPOA status.

61. The second modification we shall make to the application form is in the required statement of the applicant's intent to obey the ITU regulations. As now phrased the form requires the applicant to file

> an application stating the nature of the service to be provided and *a statement that the applicant is aware of its obligation under Article 44 of the Convention to obey all international regulations promulgated under the Convention to which the United States is a Signatory and its pledge that it will in fact honor those regulations.* [Emphsasis supplied.]

We shall substitute for the underlined language the following:

> a statement in the applicant's own words but which makes clear that the applicant is aware that it is obligated under Article 44 of the Convention to obey the mandatory provisions thereof, and all regulations promulgated thereunder, and a pledge that it will engage in no conduct or operations which contravene the Convention or regulations and that it will otherwise obey the Convention and regulations in all respects. The applicant should also include a statement that it is aware that failure to comply will result in an order from the Federal Communications Commission to cease and desist from future violations of an ITU regulation and may result in revocation of its recognized private operating agency status by the United States Department of State.

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[124] However, an "alien" is restricted in its ability to obtain certain types of radio licenses under Title III of the Act. *See* 47 U.S.C. § 310.

[125] We are also concerned about guaranteeing U.S. entities fair access to foreign markets. That is why our *International Competitive Carrier Policies* decision found U.S.-certified carriers owned by foreign telecommunications entities "dominant."

The purpose of the change is to make clearer the obligation of a U.S. enhanced-service provider to obey the international regulations and its pledge to comply. The purpose of requiring the applicant to make the statement of compliance in its own words is to require the applicant to consider the import of the obligation, rather than to rely upon a formulaic response copied verbatim. The modified language is also intended to make clear to the applicant that, notwithstanding its exemption from rate and facilities regulation, failure to comply with the international obligations of the United States will result in corrective action and that such dereliction could result in revocation of its recognized status.[126]

62. *Resale of Leased Channels.* Finally, we should like to address a matter we included in our Notice of Inquiry but which has not been extensively addressed in the comments in response to our NPRM. That is, the relation of our *Computer II* policy to the resale restrictions in CCITT Recommendation D.1. The issue arises because in *Computer II* we required AT&T to offer enhanced services (whether domestically or internationally) only through a separate corporate affiliate and to acquire the facilities it uses for those services by lease under tariff.[127] Additionally, within the United States, we permit any enhanced-service provider to use a carrier leased-channel service to provide its services and have sought to extend this policy to the international market as well, subject to the agreement of individual PTTs. In our Notice of Inquiry we observed that these policies could prove troublesome in the international market because, in some instances, they would involve a "resale" of a leased channel which could conflict with Recommendation D.1. We also observed that such policies might conflict with the resale prohibitions in the leased-channel tariffs of some U.S. overseas carriers. Not all providers of enhanced services would raise a question of "resale."

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[126] We shall also require enhanced-service providers to notify us of any transfer of control to foreign ownership. We shall also require all RPOAs to notify us if they cease operations as RPOAs, so that the United States can notify the ITU and the CCITT or CCIR, as appropriate, that these entities are no longer recognized and notify the CCITT to adjust the financial obligations of U.S. CCITT members. We shall require foreign-owned RPOAs to file operating agreements and refusals by PTTs to grant such agreements.

[127] We did not impose such a condition upon other U.S. overseas carriers (traditionally known as international record carriers or IRCs) who are free to use their common-carrier facilities to offer international enhanced services. We did, however, require Communications Satellite Corporation (Comsat) to offer competitive (including enhanced) services through a subsidiary and to acquire INTELSAT space segment from its parent (the Comsat Space Communications Division) under tariff. *See* Authorized User II, 100 FCC 2d at 202.

Enhanced-service providers who offer pure data processing via leased channels are operating within the express usage prescriptions of Recommendation D.1 and are properly viewed as customers of the carriers. It is only those enhanced-service providers who offer a public-correspondence or third-party transmission service who might be viewed as raising a resale problem.

63. Recommendation D.1 contains a number of prohibitions and restrictions on users of leased channels which have been collectively referred to as a "resale" prohibition.[128] These may be summarized as a prohibition on providing third-party or message transmission service. Consonant with Recommendation D.1, the tariffs of most U.S. overseas carriers have also forbidden resale of their leased channels.[129] AT&T created a subsidiary to offer enhanced services known as AT&T Information Systems, Inc. (ATTIS), that obtains its facilities from its parent (AT&T Communications) by leasing channels under its leased-channel tariff FCC No. 9. The services it offers constitute public correspondence (*i.e.*, a third-party or message service) under the analysis of this Report and Order. To permit it to offer international services via leased channels, AT&T removed the resale prohibition from its leased-channel tariff and replaced it

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[128] Section 1.7 of Recommendation D.1 states that

> [w]ith the limits by Administrations in each case, private leased circuits [*i.e.*, leased channels] may be used only to exchange communications relating to the business of the customer. When the circuit is used to route communications from (to) one or more users other than the customer, these communications must be concerned exclusively with the activity for which the circuit is leased.

Section 1.8 permits customers to subdivide leased channels into multiple channels of lesser bandwidth but forbids them to sublease such channels to others. Section 5.1 forbids customers to use leased channels for circuit or message switching or transmission. Section 6.1.3 allows customers to connect leased channels to public networks, with administration approval, but forbids customers from using such connected leased channels to carry traffic other than that approved by the administration or to serve users other than those approved by the administration. Section 7.2 restricts use of a computer with a leased channel to perform circuit or message switching and Section 7.3 restricts their use for store and forward or "electronic mailbox" services. Finally, Section 7.3(d) states that a leased-channel customer "shall not be permitted to operate in the manner of an administration by providing telecommunications services to others."

[129] *See* ITTWC Tariff FCC No. 43, Section C4.011; MCI Tariff FCC No. 1, Section 3.3.1(A), (B); RCAGC Tariff FCC No. 63, Section 4A; TRT Tariff FCC No. 63, p. 6; WUT Tariff FCC No. 284, Section 3.3.1. Comsat's Tariff FCC No. 103, under which Comsat's Space Communications Division offers INTELSAT space segment, does not restrict resale, since Comsat space segment is not considered leased-channel service and customer use thereof requires the agreement of a PTT.

with a statement that a customer may be required to obtain an operating agreement in order validly to resell an AT&T leased channel.[130] While this (as well as the FTCC and TRT) provision would appear to solve the problem of U.S. carrier tariff prohibitions, there remains the question whether such provisions run afoul of Recommendation D.1 which does not expressly countenance bilateral agreements to resell leased channels.[131] We hold, however, that, whenever an enhanced-service provider has entered into an operating agreement with a PTT, the enhanced-service provider's use of a leased channel to offer third-party (public-correspondence) services does not constitute a prohibited resale.[132] The resale restrictions in Recommendation D.1 seek to prevent leased-channel customers from using such channels to gain entry to that country and to compete with ("infringe upon the functions of") the administration in providing public correspondence. Where there is an agreement between the administration and the enhanced-service provider, there is no competition; they are partners. The existence of an operating agreement puts the U.S. enhanced-service provider on the same footing with respect to the PTT as a U.S. carrier. Carriers and PTTs routinely lease facilities to provide their services without creating any resale problems and the mere fact that the enhanced-service provider and the PTT agree that the enhanced-service provider can operate via a leased channel does not alter the nature of the agreement between them.[133] The enhanced-service provider would not, under such an

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[130] AT&T Tariff FCC No. 9, Section 2.2.3 A provides that

> [t]he customer is advised that, if the [leased channels] are desired for third party use, operating arrangements, independent of AT&T, must be made with the foreign administration, where required by such administration, for the foreign portion of the private line [*i.e.*, leased channel]. Without such arrangements, such use of the foreign administration's portion of the private line may be impermissible.

FTCC has filed a similar revision to its Tariff FCC No. 17, Section 4.01. TRT has filed revisions to its Tariff FCC No. 63, p. 6 and RCAGC revisions to its Tariff FCC No. 63, Section 4A permitting resale of leased channels between the United States and the United Kingdom, with the agreement of the U.K. administration.

[131] We note, however, that Section 1.7 of Recommendation D.1, *see* note 127, *supra*, provides that the Administrations jointly offering leased-channel services may, in each case, set the limits within which a customer may use a channel provided by those Administrations.

[132] We emphasize that we limit this interpretation to users who have a specific agreement with a specific PTT and to a public-correspondence service specified in that agreement. We are not seeking to erode, disregard or subvert the right of PTTs to limit or prohibit resale of their leased channels.

[133] We do not here address whether enhanced-service providers may lease channels from the more restrictive IRC leased-channel tariffs. We note that enhanced-

agreement, be competing with the PTT would be in partnership with it. Thus, such an arrangement would not raise issues to which the resale restrictions were addressed.

B. Non-Carrier IRUs

64. Turning next to the issue of private IRUs, and after reviewing the comments filed on this issue, we continue to believe that enhanced-service providers and other users can benefit from being permitted to acquire IRUs in cable circuits,[134] as an alternative to existing common-carrier, leased-channel services. We also affirm our finding that nothing in the Communications Act or other law forbids non-carriers to acquire IRUs in submarine cables which were constructed primarily for common-carrier communications services, so long as the carriers are not thereby deprived of adequate facilities to meet their duties to their remaining common-carrier-service customers. We, thus, shall affirm our tentative policy to allow customers to acquire cable IRUs on a voluntary basis.[135] Even the carriers who oppose required IRU sales agree that users may hold IRUs; they state that it is the compulsory aspect they oppose.[136] We agree with the proponents that allowing users to purchase cable IRUs will increase their flexibility in meeting their communications needs and may help reduce their cost of communications. In return for a one-time capital outlay, plus monthly maintenance and operational contributions, users electing to acquire IRUs will be able to assure themselves the availability of leased-channel-type service on a

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service providers may also obtain INTELSAT space segment from Comsat under our *Authorized User II* policy, subject to the agreement of the PTT. The use of INTELSAT space segment for third-party traffic has never been regarded as a resale.

[134] Throughout the discussion of private IRUs which follows, the term "circuit" refers both to a standard three or four KHz voice-grade circuit in an analog submarine cable and its equivalent in a digital, fiber-optic cable. In such digital cables the owners do not use the term "circuit" but the term 'MAUO" (minimum assignable unit of ownership) which is defined as a circuit providing 64,000 usable bits per second (64 kb/s).

[135] Individual circuits in submarine cables are owned on the basis of undivided half interest (most often known as "half circuits") by a party (usually a U.S. carrier) on the U.S. end and a party (most often a PTT) at the other end. The policy we adopt today allows users to acquire, on a voluntary basis, an IRU in the U.S. half interest. Neither our NPRM nor this Report and Order seeks to affect the PTT half interest. Indeed, our policy makes an IRU transfer contingent upon prior PTT agreement.

[136] Since we below conclude, on policy grounds, not to require involuntary transfers of IRUs to non-carriers, we need not address the various arguments of the parties concerning our authority to order such sales. We, of course, have power to order IRU sales if required by the public interest.

long-term basis at known and relatively fixed costs.[137] We also believe that allowing private IRUs will benefit users who elect to continue leased-channel service. We find that private IRUs could exercise downward pressure on leased-channel rates. Should a user find leased-channel rates too high, it could shift to its own IRU — if it is willing to risk the long-term commitment such an acquisition entails.[138] We also again find that a policy of non-carrier IRUs could help carriers by offering them an additional source of financing for cable projects and by reducing the carriers' cost of carrying of idle capacity (releasing capital for other investments). While the carriers argue that they do not need such additional financing or reduced costs, those benefits exist nonetheless, and redound to the benefit of their subscribers.[139]

65. *Public-Interest Analysis.* We are unpersuaded that allowing users to hold IRUs will harm the public interest. First, allowing users to hold IRUs will not complicate the facilities-planning process. We do not propose to allow users to attend plannning meeting or to become members of the cable consortium. The only difference from past planning efforts is that the participants will recognize users as potential IRU holders. Second, allowing users to acquire IRUs will nt complicate day-to-day operation of the cables. The cables are operated by the consortium of owner/investors ("co-owners") who constructed it. Those who later acquire IRUs, whether carriers or users, do not become co-owners and do not vote in the consortium. The original co-owner who transfers an IRU continues to vote its original ownership share. Third, we find that allowing private IRUs will not deprive carriers of adequate capacity for common-carriers services. Our policy is carefully limited to idle capacity for which no carrier has a

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[137] It is possible that the monthly maintenance and operating contributions, which owners of IRUs are required to pay in proportion to their share of total capacity, may increase in future years due to unforseen occurrences. However, that would also be true for carriers as well. The carriers would, presumably, seek to pass any increased costs through to their leased-channel customers in the form of higher monthly charges.

[138] In addition to the capital cost of an IRU, a purchaser would be obligated over a period of up to 25 years (the projected life expectancy of cable systems) to pay a proportionate share of monthly maintenance and operating expenses. Many users may hesitate to undertake such a long-term and open-ended commitment.

[139] Since we today decide not to order carriers to transfer IRUs to users, including enhanced-service providers, we need not address the issue in our Notice of Inquiry concerning the effect IRU ownership by enhanced-service providers would have on our ability to control their conduct. As we noted above, *see* note 122, *supra.*, we retain sufficient Title I jurisdiction over enhanced-service providers to ensure that they do not violate the ITU Convention and regulations.

current use. While it will take some effort to identify the proportion of unused capacity which customers can purchase, the task is not impossible or different in kind from AT&T's current need to consider transfers of IRUs to other carriers in planning new cable facilities. *cf. Domestic Satellite Transponder Sales*, 90 FCC 2d 1238 (1982). Finally, our policy will not infringe upon the rights of the PTT co-owners. Our policy recognizes that cable circuits are owned on an undivided-half-interest basis by U.S. entities and the PTTs. Our policy does not require PTTs to transfer their interests and makes the transfer of the U.S. half interest contingent upon the agreement of the PTTs. Our policy also requires users to negotiate all necessary agreements with the PTTs.

66. We are also unpersuaded that our private-IRU policy will be counterproductive. First, we find no reason to believe that allowing users to hold IRUs will increase the carriers' cost of leased-channel service. AT&T is correct that those most likely to acquire IRUs are large, high-volume customers who can predict with reasonable certainty a long-term need for overseas communications.[140] The fact some users may acquire IRUs, and cease taking leased-channel service, does not mean that a carrier's cost is increased or that it would be required to raise charges for remaining customers. If a customer shifts from leased-channel service to its own IRU, AT&T would be in no different position than it would if that user had shifted to the leased-channel service of another carrier.[141] AT&T has never raised rates to other users in such cases. Nor would user acquisitions of IRUs raise AT&T's cost of providing leased-channel service. As the carriers indicated in their pleadings in the *Authorized User II* proceeding,[142] they contribute little to leased-channel service beyond the cable or satellite. As a result, there are few general and administrative costs to be apportioned among remaining users.[143] Furthermore,

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[140] We are not certain how many users will risk the uncertainties of acquiring IRUs. Besides the ongoing maintenance payments, private IRU holders will run the risk not later cable facilities will be cheaper and that it may be unable to find a purchaser for its IRU should its needs change.

[141] Except, of course, that AT&T would receive a lump-sum payment from the IRU holder and monthly maintenance and operation contributions.

[142] *See* 100 FCC 2d, at 191–2.

[143] To the extent that users elect to acquire IRUs, the carriers will experience some reduction in their leased-channel revenues, but such shifts will also allow the carriers to avoid certain costs as well. For example, they would avoid the cost of acquiring a cable or satellite circuit. They will also reduce their costs of carrying unused capacity. They will also receive contributions toward cable operating expenses.

the availabiity of non-carrier IRUs as an alternative to leased-channel service will act as a brake upon the ability of the carriers to raise leased-channel rates for remaining customers.[144] Finally, the carriers have consistently claimed that leased-channel service contributes little to their overall revenues (for example, our 1978 audit and study of international services showed that leased-channel services exhibited either a low or negative rate of return[145]). By reducing the carriers' cable costs, transfers of IRUs to users might increase overall carrier profitability — even after taking the loss of leased-channel revenues into account.[146]

67. *Effect on Other Services.* We also are not persuaded that private IRUs will harm users of other services. First, as we have already indicated, our policy applies only to idle capacity and could not, therefore, divert "scarce" cable circuits from MTS, telex or any other service. Second, even the carrier projections for the TAT-8 cable show substantial unused capacity in the early years of its service life.[147] Nor could private IRUs increase the cost of MTS service. As our NPRM made clear, a private IRU is

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[144] If carriers raise leased-channel rates too high, remaining users may elect also to shift to IRUs. Such users can also get INTELSAT space segment from Comsat. The introduction of the alternative, non-carrier cable and satellite systems will further increase customer choice and restrain leased-channel rate increases.

[145] International Carriers' Rates, 75 FCC 2d 726 (1980).

[146] We also do not understand AT&T's argument concerning the relationship of the price of a private IRU to its impact upon leased-channel rates. Even at net book price, the lowest price at which an IRU transfer could be required, a carrier would be transferring circuits at the price at which they are recorded on its books and the same price the carriers use in setting their leased-channel rates. The carriers under such a circumstance would recover the same capital cost from users, either in the form of a one-time cash payment, or from a component in their monthly leased-channel tariff charges. Under the time-value theory of money, the transaction would be more or less a wash. The carriers would also continue to receive form users the monthly maintenance and operating costs of the cable circuit, either from the private IRU holders in the from of monthly payments of the circuits proportionate share of cable-system costs or, again, from a component in the monthly leased-channel tariff charges. To the extent that the IRUs transfer at a price above net-book level, the degree of cost savings a user can realize will decline, and the less likely it would be that the customer would acquire its own IRU. At such a higher price, the profit of the carriers would increase.

[147] Indeed, the possibility of substantial unused capacity prompted the French PTT, one of the large investors in TAT-8, to seek to transfer interests in some of its half interests back to AT&T to avoid the costs of holding that unused capacity. AT&T also holds 1099 unused ("latent") circuits in the St. Thomas 3 cable for which it has no planned use whatsoever. *See* AT&T Co., 88 FCC 2d 1630, 1645-7 (1982). The figures in the Pacific planning process show that after introduction of the Transpac 3 cable in 1989 there will be substantial idle cable capacity in the Pacific basin as well. *See* Pacific Telecommunications Needs, FCC 85-457, 102 FCC 2d 355 (August 22, 1985).

a substitute only for leased-channel service and the effect of IRU transfers (in terms of possible reductions in revenue or increases in costs) would similarly be limited to leased-channel service. No user would acquire a private IRU for MTS or telex service and so could not prompt it to abandon those services. The carriers account for the cost of leased channel service separately from telex or MTS, and so changes in the carriers' operating costs or investment in circuits used for leased-channel service would not affect their costs or investment in other services. Rather, we continue to believe that our IRU policy will have little or no effect upon the costs or revenues of switched services.

68. We also find no merit in AT&T's reference to the "cross elasticity" of MTS and leased-channel service. To the extent that the two services are cross elastic, economic theory predicts that a decline in the price of leased-channel service would cause MTS users to divert to leased-channel service. AT&T thus believes that, if private IRUs reduce the effective cost of leased-channel service, some MTS users may shift to private IRUs and reduce AT&T's MTS revenues. However, due to the nature of leased-channel service, there can at most be only limited cross elasticity between MTS and leased-channel service (or between MTS and a substitute for leased-channel service such as private IRUs). We find, however, that the potential cross elasticity between MTS and private IRUs is not significantly different from that of leased-channel service. Users with large enough volumes of voice or data communications between two points (such as between two offices of a corporation or between a manufacturer and a major supplier) can save money over MTS by leasing a channel. On the other hand, leased channels are less flexible than MTS and cannot be used for communications to points other than those connected by the channel. Thus, as AT&T notes, leased-channel customers tend to be large corporations or government agencies with multiple installations and large volumes of inter-office traffic. However, those large users tend also to be large users of MTS, telex and other switched services. Thus, leased channels (and, hence, private IRUs) tend largley to be supplements to, rather than substitutes for MTS, and we see no reason to believe that private IRUs would have any more effect on MTS revenues and costs than leased-channel service.

69. We thus find no merit to the claimed drawbacks of private IRUs. We turn now to our proposal to require transfers of IRUs to users. We are aware that the carriers oppose private IRUs and that, in the absence of compulsion, may not agree to such

transfers. We are also aware, however, that there are drawbacks to forcing unwilling participants into a 25-year relationship. We therefore believe that we must be cautious about exercising our regulatory power in this area and should proceed only on a clear showing that forced transfers are the only alternative. We see no such clear showing here. In the first instance, we find some merit to AT&T's criticism of the two-year limit we placed on the requirement to transfer IRUs to users. As AT&T notes, the two-year period will expire before TAT-8 is introduced and that the requirement would necessarily apply only to TAT-7 (the other Atlantic cables are fully loaded). AT&T asserts that the entry of MCI and GTE Sprint into the international MTS market has caused a shortage of TAT-7 circuits "on major routes." To the extent this has occurred, our policy would lapse on its own terms as there would be little or no "unused capacity" in which to require IRU transform.[148] Furthermore, whether or not there is a scarcity of TAT-7 circuits, the benefits of a private-IRU policy are not likely to become apparent until after the introduction of TAT-8 and the large optical-fiber cable in the Pacific which will greatly increase the number of unused cable ciruits. The vast capacity of TAT-8 will alter the facilities environment and, to the extent that our policy of private IRUs makes sense, the market should respond by making such IRUs available. Even if it does not, however, the additional user alternatives (*Authorized User II*, separate cables and separate satellites) which will also be available after 1988 could serve the same competitive function as requiring IRU transfers. Therefore, while we continue to believe that private IRUs will serve the public interest, and we encourage carriers and users to negotiate transfer arrangements, we find that we should hold our proposal to require IRU transfers in abeyance until after the introduction of TAT-8, when we shall have a clearer picture of the facilities environment and more information on the introduction of the separate cable and satellite systems.[149] If we find that competition is not developing inbeneficial ways, we shall again inquire whether we should

[148] We do not, however, hold that there is a "scarcity" of TAT-7 circuits on "key" routes. AT&T did not supply enough information on which to make such a determination. There certainly is no shortage of cable circuits in the St. Thomas 3 cable, in which ARINC also sought IRUs. *See* American Telephone and Telegraph Co., 88 FCC 2d 1630, 1647 (1982).

[149] Because we decline at this time to order carriers to transfer IRUs to users, we need not review our decision not to require such transfers to take place at net book price. Under a program of voluntary IRU transfers the carriers and users will negotiate a mutually-acceptable price.

require the carriers to transfer IRUs.

C. DNIC Assignment

70. Finally, we turn to the question of a policy for assigning DNICs. We continue to believe that there are likely to be many public and private data networks which will have a need for DNIC. In addition to the growing number of U.S. networks providing international data services U.S. domestic data networks are being built to the standards of CCITT Recommendation X.75 and will need access to a DNIC, even if they never originate or terminate international traffic. As we noted in our NPRM, the primary function of the DNIC is to identify and to facilitate routing of traffic to a particular data-network subscriber.[150] That function is needed, whether the traffic is international or domestic, whether the network is "public" or "private" or whether the network is operated by a common carrier, a local-exchange telephone company or an enhanced-service provider. As a result, we again conclude that we should not tie DNIC assignment to the existence of a Section 214 license of formal designation as an RPOA, but should assign them on the basis of need. However, because the number of networks with a need for a DNIC is likely to exceed the number of DNICs available, we again conclude that we must now adopt a formal DNIC-assignment policy to assure widespread access to DNICs. We further conclude that none of the first three options in the NPRM (first-come, first-served; marketplace allocation procedures; or national DNIC) will be adequate to this task. The first-come, first-served and marketplace procedures can assign at most 200 DNICs and, while these two approaches can assure that DNIC assignments go to those with the greatest need for them, cannot increase the number of DNICs available.[151] The national DNIC, while it might increase the number of codes available for domestic use, cannot assure an adequate supply of X.121 DNICs and could increase network costs.[152] Rather, we conclude that the only approach that would

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[150] *See* note 34, *supra.*

[151] Even those who argue for continuing *ad hoc* DNIC assignment do not deny that a shortage may occur, but argue that we can deal with a shortage (by revoking and reassigning DNICs) if and when one develops. While we agree that we have the power to revoke DNICs (no one has a property right in a DNIC), such a course would cause disruption and expense and that the better course would be to avoid the need for reassignment if possible.

[152] As defined in the NPRM, a national DNIC is one which begins with the digits 0, 1, 8 and 9 and which has significance only within the United States. *See* FCC 85-369 at para. 55. National DNICs would be unintelligible to switches of overseas networks (who recognize only DNICs beginning with the digits 2-7).

balance the need for wide access to DNICs with the need to conserve scarce codes is to require sharing of DNICs.[153]

71. As we noted in our NPRM, while many U.S. data networks will need access to a DNIC, not all need their own individual DNICs. Private networks, for example, do not qualify under Recommendation X.121 for their own DNICs but may share a DNIC either among themselves or with a public network.[154] Public networks which are not interconnected with other networks do not have traffic routed to them and thus do not need a routing code. Public data networks which are interconnected and do recevie traffic from off the network will require some way for others to route traffic to them, but even here not all such networks used their own DNICs. Some can rely on the DNIC of networks with which they connect; others, such as local exchange telephone companies, can share one or more DNICs among them. It is only networks which operate their own (or leased) interexchange and overseas lines, who must have their own DNIC.[155] By requiring domestic U.S. destination networks to share a few DNICs, we believe that we will have enough DNICs to assure that every network with its own lines can get its own DNIC.[156]

72. After reviewing the comments of the parties we conclude that the best sharing approach is a combination of the USTA (one nationwide shared DNIC) and the RBOC (seven shared regional DNICs) (NPRM Options 4 and 5) approaches. Virtually all of the

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Therefore, any U.S. network which exchanges traffic with an overseas network will need a DNIC assigned under Recommendation X.121. National DNICs of five digits or which use alphabetic and symbolic network identifiers (*see* para. 36, *supra*) are similarly unsatisfactory. While they might increase the number of DNICs available they would require renegotiation of the Recommendation X.121 numbering plan.

153 While it might be possible for the United States to obtain some additional DCCs, that requires the agreement of other nations in Zone 3 and is not certain. We thus believe that, for planning purposes, we must be conservative and assume that we will have access to no more than 200 DNICs.

154 *See* Recommendation X.121, Annex B.

155 Recommendation X.121 requires that international routing of data traffic be accomplished solely by DNIC. That is, a network in one country must be able to route traffic to a particular network in another country solely by programming its switch to read the DNIC of that network. Thus, every U.S. network which operates with an overseas network must have a DNIC which allows the PTT to select it.

156 We also shall in the future limit applicants to no more than one DNIC. However, because of the expense and disruption that would be occasioned, we shall not now revoke any of the multiple DNIC assignments we have already made. We do give notice to holders of multiple DNICs that, should the public interest require it, we may someday be required to do so. They should begin to plan for such an eventuality.

commenters supported that approach and we believe that it is useful and workable. We do not, however, believe that we should now prescribe a final data-numbering plan to be used in connection with shared DNICs. There was substantial disagreement among the commenters on this point. The only common thread is a desire that we not unduly restrict system designers in creating an operationally-efficient network architecture. We concur in that desire. For this reason, we shall refer the quesion to the T1 Committee for study and preparation of a recommendation for further Commission action. However, because we recognize that even the short time that industry consultation would require could unreasonably delay the offering of data services to the public, we shall also allow data networks who do not wish to await a final numbering plan to use a numbering plan based on the North American Numbering Plan for telephony. While we recognize that this could require networks later to shift to the final plan if it differs from the NANP, and that that would cause some dislocation and expense, it appears unavoidable — and likely to be less of a burden on users than a delay introducing needed services.[157]

73. *Routing ambiguities.* We also conclude that we need not require extensive interconnection as part of implementing a shared-DNIC policy. After reviewing the pleadings, we now conclude that routing ambiguities will not be a serious problem. While we continue to believe that we should seek to minimize the incidence of incomplete calls under a plan of shared DNICs, we do not believe that will require extensive interconnection. Rather, we can leave the question of interconnection to market forces. Network operators will be under competitive pressure to give their customers a flexible service. Since most customers generally have a choice of suppliers, if they find a network's service too limited, they can shift to a network with wider service. Nor will allowing choice unduly harm other networks. Subscribers are aware of limited interconnection and are not likely to solicit uncompletable calls. Thus, the incidence of routing ambiguities is likely to be relatively small. For this reason, while we do not agree that we lack authority to order interconnection,[158] we find no need as this

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[157] We find that the public interest would not be served by adoption of the integrated numbering plan (NPRM Option 6) or the GTE Telenet variation thereon. The 300 or more DNICs that the integrated plan would require exceeds the number we are likely to have available. We also believe that the major purpose for the integrated plan, the avoiding of routing ambiguities, is insufficient to justify the expense and difficulty entailed in implementing it.

[158] Section 202 of the Act gives us clear authority to order interconnection of

time to do so. Rather, we believe we can rely in the first instance upon voluntary interconnection and market forces to assure an efficient network.

Interim Data-Numbering Plan

74. As we have indicated, while the industry is studying the features of a final domestic data-numbering plan, we shall adopt an interim numbering plan based on the NANP. That is, all networks[159] sharing the USTA or RBOC DNICs will assign their subscriber international data numbers of 14 digits and composed of the four-digit shared DNIC plus a 10-digit network terminal number (NTN). The NTN will consist of a three-digit "data numbering plan area" (DNPA) or data area code plus a three-digit "data central office code" (DCO) or NXX code plus a four-digit "station number."[160] The DNPA will be geographically equivalent to the NPA (area code) in telephony;[161] the DCO will identify a particular network or switch serving customers within the DNPA.[162] Each serving public network will be uniquely identified by the first six digits of the NTN (the DNPA plus the DCO) or, in terms of Recommendation X.121, the PNIC. Individual (unshared) DNICs will got to (common-carrier or enhanced-service-provider) networks which perform transit functions (essentially, interexchange and overseas networks).[163] Finally, private data

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common-carrier networks. With respect to other networks, we have Title I authority to require interconnection as a condition of access to a shared DNIC.

[159] This encompasses all public networks whether operated by a common-carrier, an enhanced-service-provider, and exchange-telephone company (BOC or independent), radio common carrier, cellular carrier, etc.

[160] That is, the IDN may be represented symbolically as
DNIC + YXX + NXX + XXXX
in which "YXX" is the DNPA (analogous to the NPA or area code in telephony), the NXX is the DCO (analogous to the central-office (CO) code in telephony) and "XXXX" is the station number (analogous to the station number in telephony).

[161] That is, *e.g.*, telephone area code (or NPA) "202," which encompasses the District of Columbia, will also be DNOA "202," and will similarly encompass the District of Columbia.

[162] No DCO will be assigned to more than one carrier in a particular DNPA. Networks with more than one switch within a DNPA will be assigned a second DCO, as that a DCO will identify all the customers attached to a particular switch within a particular DNPA. The DCOs in a particular DNPA may either be drawn from the same set of three-digit numbers used as COs in the equivalent NPA (*e.g.*, the CO 632 in NPA 202 [an actual CO used in Washington, D.C.] could also be a DCO in DNPA [a data central-office code in data area Washington, D.C.]) or from a set not used as COs, as the particular DNPA may require. The set of three-digit numbers used as DNPAs could also be used as DCOs to increase the total supply of NTNs available.

[163] We intend to restrict the assignment of individual DNICs under our interim

networks who are connected to a public network will have the option to share the DNIC of the public network to which they are attached (in which case they would receive NTNs developed under that network's numbering plan or the interim numbering plan we adopt today) or to share one DNIC reserved for private networks.[164]

75. *DNIC Administration,*. We shall rely upon USTA to administer the interim numbering plan for the nationwide shared DNIC assigned to it and upon each of the RBOCs[165] to administer the DNIC assigned to it.[166] Upon release of this Report and Order, we direct USTA and the RBOCs to prepare a list of NANP NPAs within their respective geographical regions which will become the DNPAs and a list of DCOs which would be available in each DNPA (or those which would not be). From that list of available DCOs, the administrators will assign a specific DCO (or DCOs, if appropriate) on a fair and non-discriminatory basis to any public data network which serves customers within the DNPA.

76. *Equal-Dialing Arrangements*. We turn now to the request of GTE Telenet that we require "equal dialing" for data calls under a shared DNIC. Section 202 of the Communications Act forbids the BOCs to engage in unjust or unreasonable discrimination among the carriers with which they connect. The fifth objective in our NPRM concerning equal dialing was intended to give effect to

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plan only to transit networks or those who cannot share. A network seeking such an individual assignment will have the burden of showing that it cannot share. It will not be sufficient that a network would "prefer" a separate DNIC, or that it does not want to share a DNIC with a competitor.

[164] The private networks sharing the private-network DNIC may also use the interim NTN numbering plan for public networks, or they may select another mutually-agreeable numbering plans, subject to our approval.

[165] We anticipate that USTA and the RBOCs will agree to act as administrator. USTA indicated its willingness to administer the proposed nationwide DNIC for telephone companies and the RBOCs their regional DNICs and we see no reason why the addition of other networks should change their view. The exchange telephone companies and BOCs are likely to represent the largest group of those sharing the DNICs. If we are incorrect in this assumption, however, we shall find another administrator. We shall provide for those who share the DNIC to pay their ratable share of reasonable administration expenses. Because we have here set the parameters for NTN assignments, we anticipate those expenses will be trivial. We emphasize that we are not abandoning our governmental duty to control DNIC assignments. We have provided USTA and the RBOCs with the general outlines of the plan and will give specific guidance as needed. We shall also monitor the situation to assure that NTN assignments are fair and serve the public interest.

[166] For this purpose we shall reserve the following DNIC assignments: 3143 to Ameritech; 3144 to NYNEX; 3145 to Pacific Telesis; 3146 to Southwestern Bell; 3147 to U.S. West; and 3148 to USTA. We have already assigned DNIC 3141 to Bell Atlantic and DNIC 3142 to BellSouth.

the carriers' Section 202 duties and we here affirm the requirement. That is, the BOCs and other carriers sharing a DNIC under the DNIC-assignment policy we adopt today, are required to implement their assignments in a competitively fair and nondiscriminatory way, including "equal dialing" arrangements. It is not clear from the pleadings of the four respondents who addressed the question whether the Bellcore proposal not to require the customer to dial the DNIC of customers with the same DNIC violates this principle. We therefore are not in a position either to grant or deny the GTE Telenet request. We shall, rather, remind the parties of their duty not to discriminate. If anyone believes that a proposed implementaion of the RBOC or USTA shared DNIC violates Section 202, he or she may raise the matter in a formal complaint which clearly identifies the procedures complained of and shows why it believes these procedures violate Section 202.

77. *Carrier Selection.* We also shall affirm our NPRM objective four to require that DNIC assignments permit customers to select their interexchange carriers. We thus cannot accept the argument that we should let networks decide whether to allow their subscribers to choose interexchange carriers. Although we recognize that provision for customer choice might, under some circumstances, increase network costs, we find no evidence of such increased costs in the matter before us. It is the policy of the United States, wherever possible, to allow customer choice. No one has shown why our preference for customer choice would be unworkable or inefficient in the case of data services. No one knows the customer's needs and wishes better than the customer itself. Free customer choice allows the customer to decide which interexchange carrier best serves its needs. Free customer choice also allows, and requires, carriers to keep their prices low and their service quality high. Customer choice thus, will benefit users by keeping services efficient.

V. REGULATORY FLEXIBILITY ACT – FINAL ANALYSIS

78. In the NPRM we invited interested parties to comment upon our initial regulatory flexibility analysis. FCC 85-369, paras. 74-86. Our NPRM stated our legal authority for taking actionin this proceeding, concluded that our proposed policies would not duplicate, overlap or conflict with an existing federal rule, and stated the tentative view that this proceeding is unlikely to have a substantial impact upon a significant number of entities which would constitute "small businesses," as that term is used in

Section 601(3) of the Regulatory Flexibility Act, 5 U.S.C. § 601(3) (1980), or "small entities," as that term is defined in Section 3 of the Small Business Act. We further tentatively concluded that exisiting enhanced-service providers to which we are extending RPOA status are largely wholly-owned subsidiaries of larger coporations. However, we noted that, to the extent a small entity sought to offer enhanced services, our RPOA policy would assist them in entering the international market. The users of international leased-channel service which we found eligible to acquire IRUs in submarine cables are also tend to be large coporations. Finally, we concluded that the existing common-carriers, enhanced-service providers and operators of private data networks are themselves large corporations or the affiliates of large corporations. However, we noted that, to the extent a small business or small entity sought to offer private, common-carrier or enhanced data service, our proposed policies would make RPOA status readily available, allow broader access to overseas cable facilities and assure access to a shared or individual DNIC and would thus assist them in their business activities. No one challenged or filed any comments on our initial analysis.

79. We hereby certify that the Regulatory Flexibility Act does not apply to any existing U.S. holder of RPOA status, existing provisional assignee of a DNIC or existing common-carrier owner of submarine cables. None constitutes a small entity within the meaning of the Small Business Act. To the extent that any of the 1400 local exchange telephone companies might otherwise qualify as a small entity, the Regulatory Flexibility Act does not apply because the Small Business Act exempts small entities which hold a dominant monopoly status within its local service area. Each local exchange telephone carrier is the dominant supplier of telephone service within its local exchange area. We note further, however, that even though the Regulatory Flexibility Act does not apply to any known small entity, the policies we adopt comply with the spirit of the Act, since they simplify the entry of data-service providers into the international market without any regulatory burdens.

80. We conclude that the proposed application proceeding for RPOA status, although it will require an applicant to file an application with the Commission does not impose any significant regulatory burden. Enhanced-service providers cannot now obtain RPOA status, so the simple application process we adopt will grant them a valuable privilege with a minimal and irreducible administrative impact. We note that even before this proceeding

an entity seeking RPOA status was required to apply therefor and to provide information for the processing of its application. Our procedure here, thus, will simply standardize the application procedure and information requirement and, by requiring all necessary information at the outset, could expedite action on requests for RPOA status. Our decision not to require forced transfers of cable IRUs leaves users and carriers as they were, and so imposes no regulatory burdens. Our decision to allow voluntary IRU transfers will give users and carriers the chance to negotiate mutually-beneficial arrangements. Finally, our decision to refer the development of a DNIC-assignment and domestic data-numbering plan to the T1 Committee of ECSA will require the industry additional effort. However, the referral is at the request of several industry members and will benefit the industry by not prematurely imposing upon them a DNIC-assignment plan which is too rigid or which unnecessarily dictates network architecture. Adoption of a shared-DNIC interim assignment plan will require potential sharers to apply for PNIC (DNPA and DCO) assignments but it will also permit businesses to obtain use of a DNIC without waiting until the final plan is adopted. Use of the NANP for the interim numbering plan will greatly simplify and expedite PNIC assignment. On the balance these actions will either reduce or remove current regulatory burdens.

VI. PAPERWORK REDUCTION ACT

81. The formal application procedure for RPOA status has been determined under the Paperwork Reduction Act of 1980 to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by that Act.

VII. ORDERING CLAUSES

82. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201-205, 214 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201-25, 214 and 403 (1976), that (1) the proposal in our Notice of Proposed Rulemaking in the above-captioned proceeding to extend recognized private operating agency status to U.S. enhanced-service providers who offer an international "public-correspondence" service, and (2) the proposal to rely for RPOA certification upon the simple, voluntary

application process described in paras. 59–61, *supra*, are hereby ADOPTED;

83. IT IS FURTHER ORDERED that 47 C.F.R., Part 63, is hereby AMENDED by adding the two new Sections 63.701 and 63.702 shown in the appendix attached hereto;

84. IT IS FURTHER ORDERED that the new Sections 63.701 and 63.702 of our Rules and Regulations adopted today will become effective 30 days after publication of a summary of this Report and Order in the Federal Register;

85. IT IS FURTHER ORDERED that the proposal to grant U.S. enhanced-service providers and other non-carrier users the right to acquire indefeasible rights of user in U.S. half-circuits in common-carrier submarine telephone cables on a voluntary basis IS ADOPTED and the American Telephone and Telegraph Company and other U.S. common carriers are AUTHORIZED, as provided for herein, to transfer such IRUs at a price agreed upon between the carrier and the user, subject to the agreement of the entity which holds the other undivided one-half interest of the circuit;

86. IT IS FURTHER ORDERED that the proposal to adopt a formal DNIC-assignment plan is, as provided in paras. 70–77, *supra*, hereby ADOPTED, but that adoption of a final domestic data-numbering plan for the United States is DEFERRED pending further study and preparation of a recommendation to this Commission thereon by the Exchange Carriers Standards Association as provided for in para. 87, *infra*,.

87. IT IS FURTHER ORDERED that the issue of a domestic data-numbering plan for the United States is hereby REFERRED to the "T1" Committee operating under the aegis of the Exchange Carriers Standards Association, or such other subcommittee as that body shall deem appropriate, for further study and preparation of a recommendation for further Commission action;

88. IT IS FURTHER ORDERED that the staff of the Common Carrier Bureau is delegated authority to attend meetings of the ECSA T1, or other Committee, to which the question of developing recommendations for a U.S. domestic data-numbering plan is referred, to monitor information submitted on that topic and to report to us as necessary;

89. IT IS FURTHER ORDERED that the motion of U.S. West, Inc., to accept its unauthorized Further Comments, and the BellSouth Corporation motion for leave to file a responsive

pleading, are hereby DENIED and their pleadings DISMISSED;

90. IT IS FURTHER ORDERED that this proceeding shall remain OPEN for further Commission action on the issue of a final domestic data-numbering plan for the United States, pending receipt of the results of the further industry study provided for in para. 87, *supra*, or submission of a formal proposal for Commission action, and such further Commission deliberations as the public interest shall require.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

CC Docket No. 83-1230

Request for Designation as a
Recognized Private Operating Agency

47 C.F.R., Part 63, is amended in the following respects:

1. The Title of Part 63 is revised to read as follows:

Part 63 — EXTENSION OF LINES AND DISCONTINUANCE OF SERVICE BY CARRIERS AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

2. The following two new sections are added:

§ 63.701 Contents of Application

Except as otherwise provided in this part, any party requesting designation as a Recognized Private Operating Agency within the meaning of the International Telecommunication Convention shall request such designation by filing an original and two copies of an application stating the nature of the services to be provided and a statement in the applicant's own words but which makes clear that the applicant is aware that it is obligated under Article 44 of the Convention to obey the mandatory provisions thereof, and all regulations promulgated thereunder, and a pledge that it will engage in no conduct or operations which contravene the Convention or regulations and that it will otherwise obey the Convention and regulations in all respects. The applicant should also include a statement that it is aware that failure to comply will result in an order from the Federal Communications Commission to cease and desist from future violations of an ITU regulation and may result in revocation of its recognized private operating agency status by the United States Department of State. Such statement must include the following information where applicable:

(a) The name and address of each applicant;

(b) The Government, State, or Territory under the laws of which each corporate applicant is organized;

(c) The name, title and post office address of the officer of a corporate applicant, or representative of a non-corporate applicant, to whom correspondence concerning

the application is to be addressed;

(d) A statement of the ownership of a non-corporate applicant, or the ownership of the stock of a corporate applicant, including an indication whether the applicant or its stock is owned directly or indirectly by an alien;

(e) A copy of each corporate applicant's articles of incorporation (or its equivalent) and of its corporate bylaws;

(f) A statement whether the applicant is a carrier subject to Section 214 of the Communications Act, an operator of broadcst or other radio facilities, licensed under Title III of the Act, capable of causing harmful interference with the radio transmissions of other countries, or a non-carrier provider of services classed as "enhanced" under § 64.702(a);

(g) A statement that the services for which designation as a recognized private operating agency is sought will be extended to a point outside the United States or are capable of causing harmful interference of other radio transmission and a statement of the nature of the services to be provided;

(h) A statement setting forth the points between which the services are to be provided; and

(i) A statement as to whether covered services are provided by facilities owned by the applicant, by facilities leased from another entity, or other arrangement and a description of the arrangement.

§ 63.702 Form

Application under Section 63.701 shall be submitted in the form specified in Section 63.53 for applications under Section 214 of the Communications Act.

Rate Base
Rate of Return
Rulemaking, Notice of Proposed

Notice of Proposed Rulemaking adopted seeking to establish reports that are required to implement enforcement of maximum rate of return prescriptions and some interim reporting requirements for local exchange carriers for monitoring carriers' actual performance on an element-by-element basis. Notice, also, proposes to clarify rate base adjustments that must be reflected both in rate of return reports and cost justification for particular tariffs.
—*Interstate Rate of Return*
CC Docket No. 86-127

FCC 86-157

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 65, Interstate Rate of Return Prescription: Procedures and Methodologies to Establish Reporting Requirements.	CC Docket No. 86-127

NOTICE OF PROPOSED RULEMAKING

Adopted: April 8, 1986; Released: April 16, 1986

BY THE COMMISSION:

INTRODUCTION

1. On September 27, 1985, we adopted a *Report and Order*, CC Docket 84-800, Phase I (*Phase I*)[1] determining that AT&T Communications (AT&T) and the local exchange carriers (LECs) should continue to use the current authorized rate of return of 12.75 percent, pending represcription of the authorized rates of

[1] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC No. 85-527, 50 Fed. Reg. 41350 (October 10, 1985).

return. The *Phase I Order* also adopted refund mechanisms if AT&T or an exchange carrier were to earn above the allowable rates of return, subject to a specified range.

2. In *Phase I*, we concluded that for AT&T, the upper bound for the range of reasonableness would be set by adding 1/2 of 1 percent to the prescribed rate of return. Earnings will be examined by Interim Cost Allocation Manual (ICAM) categories,[2] and the returns will be examined for a two-year period.

3. For the LECs, we determined that the range of reasonableness on the exchange carriers' overall rate of return should be set by adding 1/4 of 1 percent to the authorized rate of return. The *Phase I Order* provided that earnings will be reviewed over a two-year period on an access element-by-access element basis, but with the end office elements combined for rate of return review purposes. However, a slightly wider range of 4/10 of 1 percent should be used for reviewing particular elements, so long as the overall return does not exceed the authorized return by more than 1/4 of 1 percent. On reconsideration, we further aggregated the transport and information elements with the end office category, and codified the enforcement rules as Subpart F of Part 65 of the Commission's Rules.[3]

4. *Phase I* altered the dates that determine each access tariff year so that access tariff years will be coincident with calendar years beginning January 1, 1987. Because the transition to calendar years involves a transitional earnings review period of less than two years, we decided to allow the initial exchange carrier ceiling to increase by an additional 1/10 of 1 percent for the intial period of review.

5. On reconsideration of *Phase I*, this Commission allowed AT&T an additional 1/10 of one percent to the 1/2 of one percent category-by-category increment adopted in the *Phase I Order*, and changed the time frame of the initial measurement period. Thus, regardless of its overall return, AT&T will be required to make refunds if either its private line service revenues or its switched service revenues exceed 13.35 percent for the period from May 1,

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[2] AT&T Co., 73 FCC 2d 629 (1979), 78 FCC 2d 1296 (1980), 84 FCC 2d 384 (1981), *recon.* 86 FCC 2d 667 (1981), *affd. sub nom*, MCI Telecommunications Corp. v. FCC, 675 F. 2d 413 (D.C. Cir. 1982).

[3] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 86-114, released March 24, 1986 (*Phase I Reconsideration Order*). Those enforcement rules require exchange carriers with excess revenues to effect restitution through reductions in revenue requirements that are to become effective in the year subsequent to the year in which the determination is made.

1985 to December 31, 1986.[4] For the LECs, this Commission decided to allow a somewhat higher level of access element aggregation than the level permitted in the *Phase I Order*, but affirmed our decision to review earnings at the same geographic level of aggregation at which rates are developed and filed. The initial review period for the LECs was changed and now will run from October 1, 1985 to December 31, 1986. The *Phase I Reconsideration Order* also provided that there will be three categories for determining whether excess revenues have been received by exchange carriers: common line, special access and switched traffic sensitive (consisting of line termination, local switching, intercept, information and local transport). While individual elements' earnings within the switched traffic sensitive category in excess of the ceiling will not automatically trigger a refund (absent the category as a whole exceeding the ceiling), excessive revenues on particular elements will evoke close scrutiny, which could lead to prospective tariff changes.[5]

Discussion

6. This rulemaking serves three purposes. We are proposing to adopt rules to establish the reports that are required to implement our decision to enforce maximum rate of return prescriptions. We are also proposing to establish some interim reporting requirements for local exchange carriers to enable us to monitor the carriers' actual performance on an element-by-element basis. We believe such reports will be of assistance in the tariff review process and that the reports will provide us and the carriers with an early warning system if rate adjustments are necessary to correct a significant targeting error. Finally, we are proposing to clarify rate base adjustments that must be reflected both in rate of return reports and the cost justification for particular tariffs. Clarification is required because zero cost sources of funds will no longer be considered in establishing an authorized rate of return. We propose to effectuate those "Zero Cost" offsets by proportionately reducing the interstate rate bases of exchange carriers that we regulate.

7. Because the reports will be utilized for enforcement purposes, it is necessary to specify time limits for interperiod adjustments and treatment of refund obligations from prior rate of return review periods. For restitution purposes, we will need a biennial

[4] *Phase I Reconsideration* at para. 18.
[5] *Phase I Reconsideration* at para. 38.

enforcement report, to be filed for each enforcement period, that will be conclusively binding upon the National Exchange Carrier Association (NECA) and each exchange carrier that files its own access tariffs with this Commission. That report shall contain the necessary rate of return computational detail for this Commission and the carriers to set in motion the refund process.

8. The LEC reporting system will only affect the LECs that file their own access tariffs with this Commission. The other LECs provide interstate access in agreement with tariffs filed by NECA.[6] Although the NECA pools include many small companies that are not able to develop data on a current and ongoing basis, NECA still receives and develops estimates. NECA currently files, and should continue to file with this Commission, its monthly report summarizing total pool settlements. In addition to NECA's monthly filing, we believe that without a great increase in effort or expense NECA can provide a quarterly report similar to the one proposed for the LECs. NECA rates of return would be reported for each pool. Information would also be provided on a cumulative basis for the measurement period. This data, in conjunction with the reports filed by the individual LECs, should enable us to oversee the complete market for interstate access.

9. Currently, a report for monitoring AT&T's overall interstate rate of return exists. AT&T files an interstate montly report (IMR1) with this Commission, and on an annual basis a fully distributed cost (FDC) report. However, the IMR1 provides only an overall interstate rate of return without any distinctions made for the various ICAM categories: MTS, WATS and Private Line. The FDC report, with earnings computed by ICAM category, is not reported as often as needed and arrives some seven months after the close of the reporting period. This Commission needs reports from AT&T of rates of return earned on their different services on a more timely basis. Quarterly filings of a FDC report based upon ICAM principles should suffice.[7]

10. In the *Phase I Order*, this Commission selected a two-year evaluation period so that carriers have the opportunity to make mid-course corrections as part of their regular annual access tariff

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[6] *See*, 47 C.F.R.; 69.601 *et seq*. For the most recent tariff filing, 84 LECs filed individually with this Commission, while the remaining LECs chose to be in the NECA pools.

[7] We recognize the need to rely on prior year factors or special studies for many inputs because they are not updated on a quarterly basis. Thus, we would expect AT&T to use the most current factors, but we recognize that some of the factors may be "dated." The "final" report, however, should reflect the current, final factors.

filing or, in AT&T's case, tariffs responding to revised access tariffs. We feel that quarterly filings of rates of return should allow us to keep abreast of the effects of current rates and also allow enough time for adjustments on an as needed basis. These quarterly reports, along with the two-year evaluation period, should ensure that this Commission will rarely, if ever, be involved in refunds to customers.

11. We propose to prescribe a quarterly report form to be designated as FCC Form 492, Quarterly Report of Rate of Return. The form would be required to be filed within three (3) months after the end of the reporting quarter by all LECs filing individual access tariffs and would be aggregated at the same jurisdictional levels as the tariffs. It is anticipated that the first reports would be for the fourth quarter of 1985 and the first quarter of 1986 and would be filed within 90 days after a summary of the final order is published in the *Federal Register*.[8]

12. As a collateral matter, we are presently developing an automated reporting and management information system (ARMIS), which should enable us to tie together Parts 31 (or the new 32), 67 and 69 of the Commission's Rules. When ARMIS becomes operational, it should obviate the need for the quarterly reports (interim reports) that are used for monitoring purposes. The automated system will not, however, obviate the need for the reports that are filed at the end of a review period and that will be used for rate of return enforcement purposes.

13. One issue that commenting parties should address is out of period adjustments which are financial events that occured in a period other than the period being measured or reported. At this point, we are inclined to require such interperiod adjustments, so that the reports accurately reflect the carrier's earnings in each period. However, a cut-off date for interperiod adjustments and revisions is necessary for this Commission to utilize these proposed reports. Since the information will be filed within three months after the end of the quarter, we feel an additional 5 months should allow the companies ample time to correct their prior quarterly reports. Although the initial filings should represent a good approximation to a company's earnings, the additional months available to make final adjustments in each report will allow companies time to better develop and be more certain of their results. We realize that exceptions to the above time

[8] In order to have complete data for the initial measurement period (October 1, 1985 through December 31, 1986), we will need a report for the fourth quarter of 1985.

constraints may sometimes be necessary, but feel that we must set a cut-off date for updating the report.[9] We do, however, propose to require the submission of final adjustments to the biennial report by August 31 of the year following the enforcement period to ensure that any refunds can be properly reflected in an annual access filing.

14. If a carrier is effectuating refunds through revenue requirement reductions, we also propose that the value of those refunds (including accrued interest) be included, as a separate revenue line item, in the carrier's periodic interstate earnings statements, and shall be deemed additional operating revenue for the purpose of evaluating whether the authorized rate of return ceiling has been exceeded in the current measurement period.

15. Tentatively, we feel that the proposed quarterly and biennial filings permit us to satisfy our regulatory requirements without posing a burdensome reporting system on the carriers or this Commission. However, in addition to comments on our proposals, we solicit comments on whether we should have an increased frequency of reporting or whether less frequent reporting would suffice. Also, we solicit comments from companies that will be affected, as well as other interested parties, on the nature and scope of the basic reporting requirements that should be prescribed, together with more detailed comments on selected areas of regulatory concern. For instance, should data on intrastate rates of return by incorporated into the form including the details of methods used by individual states to compute a rate of return, or should reporting frequency be a function of carrier size.

16. Docket No. 19129 (Phase II) established principles for determining the interstate revenue requirements of the Bell System, *i.e.*, rate base and expense.[10] In order to have consistent industry wide reporting, we are tentatively proposing that all carriers and NECA use this set of rate base and expense inclusion or non-inclusion principles for revenue requirement (tariff) filing and rate of return enforcement purposes. A corollary issue is the handling of zero cost sources of funds. This was addresed in the most recent rate of return proceeding for the former integrated

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[9] We would grant waivers to the above cut-off date only if a company could demonstrate extraordinary circumstances that prevent reporting accurate data within the acquired time frame.

[10] American Telephone and Telegraph Company and Associated Bell System Companies — Charges for Interstate Telephone Service, Transmittal Nos. 10989, 11027, 11657, Docket No. 19129, (Phase I) FCC 77-150, 64 FCC 2d 1 (1977).

Bell System.[11] Several minor zero cost sources of funds were identified. Inasmuch as those items will not be considered in the new rate of return determination, it will be necessary to adjust the rate base to reflect those items. We would propose to use the interstate portion of total plant in service in order to identify the interstate portion of these zero cost funds for purposes of this adjustment. Further refinements and modifications of rate base adjustment will be necessary in the future. We expect to institute a separate proceeding for that purpose. In the interim, we feel the relevant Docket 19129 and CC Docket No. 79-63 principles should be followed for purposes of the 1987 annual access filing and the initial rate of return reports since they are the only present set of methodologies that would permit consistent reporting of interstate earnings.

Other Matters

17. The proposed rule changes in Parts 1 and 65 necessary to implement Form 492 are attached as Appendix A. Information to be requested in the proposed enforcement report is included in Appendix B. Information to be requested in the proposed quarterly monitoring report is included in Appendixes B and C, combined.[12]

18. In compliance with the provisions of Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. § 605(b), we believe the above discussion sets forth the purpose of the proposed requirements. These forms will be filed only by the LECs that have filed access tariffs with this Commission.[13] Therefore, we certify that the Regulatory Flexibility Act is not applicable to the rules we are proposing in this proceeding.

19. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements or burdens upon the public. Implementation of any new or modified requirement or burdens will be subject to review by the Office of Management and Budget as prescribed by the Act.

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[11] American Telephone and Telegraph Company, CC Docket No. 79-63, 86 FCC 2d 221 (1981).

[12] The attestation and General Instructions for the biennial form will be essentially the same as the proposed attestation and General Instructions for the quarterly form that are set forth in Appendix C.

[13] The Commission has found all LECs to be dominant carriers in the *Competitive Carrier* proceeding, 85 FCC 1, 23-24 (1980).

20. For purposes of this nonrestricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments or pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff, which addresses the merit of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any written comments previously filed in the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each such *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state the docket number of the proceeding to which it relates. *See generally*, Section 1.1231 of the Commission's Rules, 47 C.F.R. § 1.1231. A summary of the Commission procedures governing *ex parte* presentations in informal rulemaking is available from the Commission's Consumer Assistance Office, FCC, Washington, D.C. 20554.

21. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and providing that the fact of the Commission's reliance on such information is noted in the Report and Order.

Ordering Clauses

22. ACCORDINGLY, IT IS ORDERED, That pursuant to the provisions of Sections 4(i), 4(j); and 205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), and 205, there is HEREBY INSTITUTED a notice of proposed rulemaking into the foregoing matters.

23. IT IS FURTHER ORDERED, That interested persons may file comments on the specific proposals discussed in this Notice on or before May 15, 1986. Reply comments shall be filed on or before May 30, 1986. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, 47 C.F.R. § 1.419, an original and five (5) copies of all comments shall be furnished to the Commission. Copies of the comments will be available for public inspection in the Commission's Docket Reference Room, 1919 M Street, N.W., Washington, D.C.

24. IT IS FURTHER ORDERED, that the Secretary shall serve a copy of this Notice on each state commision.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

Part 1, Practice and Procedure and Part 65, Interstate Rate of Return Prescription Procedures and Methodologies, of the Commission's Rules are proposed for amendment as set forth in Paragraphs A and B:

A. Section 1.795 is added to read as follows:

§ 1.795 Reports regarding interstate rates of return.

Carriers shall file reports regarding interstate rates of return on FCC Form 492 as required by Part 65 of this chapter.

B. A new Subpart is added to read as follows:

Subpart E: Rate of Return Reports

§ 65.600 *Rate of Return Reports.*

(a) Subpart E shall apply to those interstate communications common carriers and exchange carriers that are so designated by Commission order.

(b) Each exchange carrier which has filed individual access tariffs during the preceding enforcement period shall file with the Commission, within three (3) months after the end of each enforcement period, a rate of return enforcement report on the appropriate report form prescribed by the Commission (See § 1.795 of this chapter) and shall provide full and specific answers to all questions propounded and information requested in the currently effective report form. The number of copies to be filed shall be specified in the applicable report form. At least one copy of the report shall be signed on the signature page by the responsible officer. A copy of each report shall be retained in the principal office of the respondent and shall be filed in such manner as to be readily available for reference and inspection. Final adjustments to the enforcement report shall be made by August 31 of the year following the enforcement period to ensure that any refunds can be properly reflected in an annual access filing.

(c) Each exchange carrier which has filed individual access tariffs during the preceding year shall also file with the Commission, within three (3) months after

the end of each calendar quarter, a quarterly rate of return monitoring report. The rate of return monitoring report shall consist of two parts. The first part shall contain rate of return information on a cumulative basis from the start of the enforcement period through the end of the quarter being reported. The second part shall contain information only for the quarter being reported. The number of copies to be filed shall be specified in the applicable report form. At least one copy of the report shall be signed on the signature page by the responsible officer. A copy of each report shall be retained in the principal office of the respondent and shall be filed in such manner as to be readily available for reference and inspection. Final adjustments to a quarterly monitoring reports shall be made within eight (8) months after the end of the reported quarter.

(d) Each designated interstate carrier shall file with the Commission, within three (3) months after the end of each calendar quarter, a quarterly fully distributed cost report based upon the Commission's Interim Cost Allocation Manual principles. Final adjustments to each quarterly fully distributed cost report shall be made within eight (8) months after the end of the reported quarter.

Multipoint Distribution Service
Rulemaking, Notice of Proposed

Notice of Proposed Rulemaking adopted seeking to delete both the fifty percent rules, Section 21.903(b)(2), and Section 21.903(b)(1). In addition, Commission intends to permit MDS licensees to choose whether they wish to offer MDS on a non-dominant common carrier basis subject to forbearance or as a non-common carrier.
—*Multipoint Distribution Service*
CC Docket No. 86-179

FCC 86-226

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Revisions to Part 21 of the Commission's Rules regarding the Multipoint Distribution Service	CC Docket, No. 86-179

NOTICE OF PROPOSED RULEMAKING

Adopted April 30, 1986; Released May 9, 1986

By the Commission:

I. BACKGROUND

On July 15, 1983, the Commission reallocated two groups of four - six MHz channels (the E-channel group and the F-channel group) from the Instructional Television Fixed Service (ITFS) to the Multipoint Distribution Service (MDS) for multichannel MDS (MMDS) use.[1] The Commission's reallocation decision[2] was based

[1] In this Notice of Proposed Rulemaking, the term "MMDS" refers to the reallocated E-group channels (E1 — 2596 to 2602 MHz, E2 — 2608 to 2614 MHz, E3 — 2620 to 2626 MHz, E4 — 2632 to 2638 MHz and F-group channels (F1 — 2602 to 2608, F2 — 2614 to 2620 MHz, F3 — 2626 to 2632 MHz, F4 — 2638 to 2644 MHz). The phrase "single-channel MDS" refers to channel 1 (2150 — 2156 MHz), channel 2 (2156 — 2162 MHz) or channel 2A (2156 — 2160 MHz) frequencies. The term "MDS" refers to both MMDS and single channel MDS.

on two fundamental findings. First, we found there were a substantial number of unused ITFS findings. First, we found there were a substantial number of unused ITFS channels and the anticipated growth in this service was unlikely to exhaust the supply of channels. Second, we determined that there was a substantial demand for multiple channel MDS that could not be met by the supply of channels then available.[3] In establishing application procedures, the Commission decided that applicants seeking MMDS authorizations could submit one application for either the E-group channels of the F-group channels, but could not apply for both.

2. In the *MMDS Lottery Report and Order*, the Commission decided to use a lottery, with preferences, to select permittees in the newly reallocated MMDS but not to use a lottery to select permittees for the existing singel-channel MDS.[4] Our decision to use preferences in MMDS lotteries was based on the conclusion that the award of preferences would be consistent with the expressed intent of Congress to provide preferences in any lottery involving "media of mass communications". Section 309(i)(3)(c)(i) of the Communications Act of 1934, as amended ("the Act"), defines the term "media of mass communications" to include "television, radio cable television, *multipoint distribution service*, direct broadcast satellite service, and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee"[5] (emphasis added).

3. Historically, MDS has been regulated as a common carrier service. The regulatory framework applied to MDS is that prescribed by Title II of the Act and the rules the Commission has adopted to implement those provisions. One of the traditional attributes of common carriage implicit in the obligation to furnish service "upon reasonable request therefor,"[6] is that the licensee may not exercise editorial control over the information transmitted.[7] This limitation is specifically reflected in Part 21 of our

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[2] Instructional Television Fixed Service, 94 F.C.C. 2d 1203 (1983), *reconsideration denied*, 98 F.C.C. 2d 129 (1984) [hereinafter referred to as "MMDS Reallocation Plan"]; Second Report and Order, 50 Fed. Reg. 5983 (February 13, 1985) [hereinafter referred to as "MMDS Lottery Report and Order"].

[3] MMDS Reallocation Plan, 94 F.C.C. 2d at 1206.

[4] The Commission found it could meet the congressional criteria for using a lottery in MMDS, but could not meet the criteria for single-channel MDS. *See* MMDS Lottery Report and Order, 50 Fed. Reg. at 5985.

[5] 47 U.S.C. § 309 (i)(3)(c)(i) (Supp. 1982).

[6] 47 U.S.C. § 201(a). *See also* 47 U.S.C. § 201(b).

[7] FCC v. Midwest Video Corp., 440 U.S. 689, 701-02 (1979). *See also* Nat'l Ass'n

rules, Section 21.903(b)(1), which provides that MDS carriers may not be "substantially involved in the production of, the writing of, or the influencing of the content of any information to be transmitted over the facilities." 47 C.F.R. § 21.903(b)(1). In addition, Section 21.903(b)(2), commonly known as the "fifty percent rule", provides that:

> the [MDS] carrier [may] not render service to any entity who is affiliated with or related to the carrier whenever the total hours of service rendered to related subscribers exceeds the total hours of service rendered to unrelated subscribers within any calendar month.

In adopting a lottery with preferences for MMDS, we stated our intent to re-evaluate the relationship between Sections 21.903(b)(1) and 21.903(b)(2) as they bear upon the continued propriety of classifying MDS as a common carrier service and its continued regulation under Title II of the Act in light of its description as a "medium of mass communication".[8] By this Notice, we consider these issues.

II. PROPOSAL SUMMARY

4. Our proposal is to permit MDS carriers to elect to render any kind of point-to-multipoint communications service as either a common carrier or a non-common carrier. However, we propose to change the common carrier classificiation of the service to "non-dominant" common carrier subject to forbearance. In addition, for those applicants choosing to make their offerings available on a common carrier basis, we propose to delete Sections 21.903(b)(1) and 21.903(b)(2) from our rules.[9] Non-common carrier licensees would be subject to the requirements imposed by Title III of the Act relevant to entities seeking a radio license. Non-common applicants and common carrier applicants would be

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of Reg Util. Com'rs. v. FCC, 533 F.2d 601, 609 (D.C. Cir. 1976) ("NARUC II") ("A second prerequisite to common carrier status . . . is the requirement . . . that customers 'transmit intelligence of their own design and choosing' ") (citing Industrial Radiolocation Service, 5 F.C.C. 2d 197, 202 (1966)).

[8] MMDS Lottery Order, 50 Fed. Reg. 5983, 5985 n. 17 (1985).

[9] We recognize that this proposal is at variance with our previously stated intent to propose to permit MMDS operators to fully program their facilities and to change the regulatory classification of the service to non-common carrier. MMDS Lottery Report and Order, 50 Fed. Reg. 5983, 5985 n. 17 (1985). Upon re-examination of these issues, we now believe that, for the reasons set forth in this Notice, the public interest in having available alternatives by which to satisfy communication requirements will best be served by the approach we are proposing.

subject to the same licensing rules under Part 21.

III. REGULATORY APPROACH TO MDS

5. Currently, MDS entails a four-party relationship. The licensee makes an offering of its single channel of transmission capacity to the public pursuant to tariff. The programmer-customer leases transmission capacity from the licensee, typically for 100% of the time and 100% of the channel capacity. Generally, the programmer customer enters into a contract with a program supplier to distribute programming services to end-users (such as hotels, motels, apartment complexes and single family residences) for a pre-determined fee. Although the licensee bears the cost associated with construction of the facility, the programmer-customer assumes the financial and operating obligations associated with establishing a subscriber base and obtaining the programming material from the program supplier.

6. MDS is unique among common carrier services, both in terms of the technology it employs and the use to which it is put by the customers. We have described MDS as a service that utilizes "essentially broadcast technology to distribute multiple addressed broadband communications (usually forms of television) simultaneously to the members of commercial and other institutional subscribers in accordance with their specific transmission, reception and other information requirements."[10] Although it uses a "broadcast" techonology, the Commission has not classified this point-to-multipoint service as a "broadcast" service as the term is defined by Section 3(o) of the Act, nor would such a characterization be consistent with our proposed treatment of other services.[11] Consequently, Title III obligations applicable to "broadcasters" have not been applied to MDS licensees, nor do we intend to reclassify MDS as a "broadcast" service in this proceeding. On the other hand, MDS licensees often establish medium to long-term tariff relationships with their customer-programmer. In *National Ass'n of Regulatory Util. Comm'r v. FCC*, 525 F.2d 630,

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[10] The Domestic Public Radio Service, 76 F.C.C. 2d 273, 281 (1980).

[11] Unlike conventional broadcasters whose transmissions are intended for the general public, MDS transmissions are intended for specific recipients. *See* Home Box Office, Inc. v. Pay TV of Greater N.Y., 467 F. Supp. 525 (E.D.N.Y. 1979).

The regulatory classification of subscription television services as non-broadcast services was recently proposed by the Commission in a Notice of Proposed Rulemaking Concerning the Regulatory Classification of STV and DBS, Gen. Doc. 85-305, FCC 85-538, released January 8, 1986.

643 (1976) (NARUC I), the court indicated that the establishment of medium to long-term contractual relationships may be an indicia that a service is not being provided as common carriage.[12] However, a key aspect of common carriage is that a common carrier must indiscriminately hold itself out to serve the user public either as a matter of practice or as a matter of law. Thus, despite certain non-common carrier characteristics of MDS, the licensee's obligation to make non-discriminatory offerings of its service to the public is critical to the designation of MDS as a common carrier service.

7. MDS is also a flexible service capable of meeting a variety of marketplace demands. At the time of its inception, it was anticipated that it would be used primarily for the transmission of business data, video teleconferencing and other forms of high-speed computer data. In fact, there have been some such uses. Reuters News Service, for example, has utilized an MDS facility for the distribution of financial and commodity information.[13] MDS may be used to transmit instructional and training television programs to schools, industry, and municipal governments or to cover business, industry or medical conventions.[14] However, the primary use of the service has been for the transmission of video entertainment programming. Due to this predominant use, MDS has been found to be a part of the video distribution market for purposes of analyzing the syndication and financial interest rules,[15] multiple ownership rules,[16] and other requirements.[17] In 1983, we made the service even more flexible by adding return channels; thus, MDS now can be used as a two-way communications service.[18] From a public policy perspective, the fact that the use of MDS for the distribution of business data has proceeded more slowly than originally envisioned and has been eclipsed by its predominant use as a delivery system for the distribution of

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[12] *See also supra* note 6.

[13] Domestic Public Radio Service, 76 F.C.C. 2d at 281.

[14] *Id.*

[15] Amendment of Part 47, Tentative Decision and Further Request for Comments, 94 F.C.C. 2d 1019, 1055–63, 1082 (1983) (Syndication and Financial Interest Rules).

[16] Amendment of Section 73.3555, 100 F.C.C. 2d 17 (1984) (Multiple Ownership Rules), *stayed*, 100 F.C.C. 2d 74 (1984).

[17] Commercial Television Stations, 98 F.C.C. 2d 1076 (1984).

[18] Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules to Allocate Spectrum at 18 GHz for, and to Establish Other Rules and Policies Pertaining to, the Use of Radio in Digital Termination Systems and in Point-to-Point Microwave Radio Systems for the Provision of Digital Electronic Message Service, for other Common Carrier, Private Radio, and Broadcast Auxiliary Services, 54 Rad. Reg. (P & F) 1091, 1096–97 (1983).

premium television entertainment programming is not significant. Rather, it demonstrates that the techonological development and future use of the service is difficult to predict with any degree of certainty. It also demonstrates that MDS lends itelf to a regulatory framework that will allow it to develop with few Commission-imposed restraints. Therefore, we conclude that a Commission policy allowing a licensee flexibility to offer service in a number of different ways will most efficiently serve the Commission's policies of stimulating technological innovation, lowering rates, increasing diversity in the marketplace, and offering the public flexibility in meeting its communications needs.[19] Consequently, we are unable to conclude that requiring MDS service to be offered exclusively on a common carrier basis is in the public interest. Therefore, we propose to permit MDS carriers to provide service either on a non-common carrier or common carrier basis.

IV. NON-COMMON CARRIER

8. In other services, the Commission has rejected placing restrictions on carriers who wish to provide service on a non-comon carrier basis. For example, in the domestic fixed satellite area we recognized that suppliers and customers were interested in arranging for space segment capacity on a non-common carrier basis. As a result, we authorized domestic satellite operators to offer, on a case-by-case basis, non-common carrier services through sales of discrete transponders. In doing so, we noted the variety of potential uses of such facilities (e.g., sophisticated data,

[19] Our recommendation here parallels recent actions taken to permit more efficient use of the spectrum for other services. *See, e.g.*, Private Operational-Fixed Microwave Radio Service (OFS), PR Docket No. 83-426, *First Report and Order*, 50 Fed. Reg. 13338 (April 4, 1985), permitting the offering of a communications service on a commercial basis by eligibles in the OFS, and *Memorandum Opinion and Order*, released March 14, 1986, 51 Fed. Reg. 10545 (March 27, 1986), modifying decision to allow only non-dominant common carriers to provide OFS service to others on a private carrier basis, while deferring decision on dominant carriers; Interconnection in Private Land Mobile Services, Docket Nos. 20846 and 84-414, *Memorandum Opinion and Order*, 48 Fed. Reg. 29,512 (June 27, 1983), *Memorandum Opinion and Order*, 49 Fed. Reg. 26,066 (June 26, 1984), *Report and Order*, Fed. Reg. 15,148 (April 17, 1985), permitting more efficient use of interconnection of private land mobile radio stations with the public switched telephone network in accordance with The Communications Amendments Act of 1982, P.L. 97-259, 96 Stat. 1087, September 13, 1982; 47 U.S.C. Section 332; and Permissible Communications in the Private Land Mobile Radio Services, PR Docket No. 84-109, *Report and Order*, 50 Fed. Reg. 6,179 (February 14, 1985), relaxing the permissible communications rules as they pertain to operations on exclusive channels in the private land mobile radio services.

switched message, video and audio) and the number of potential suppliers. Absent compelling evidence that such action was unnecessary, the Commission was reluctant to thwart such arrangements. We concluded that under these circumstances, individualized transactions would serve the public interest.[20] Furthermore, such transactions would provide certainty of supply for interested customers, fixed prices, specific design features catered to particular needs, certain tax advantages, and an environment more conducive to new entry.[21] Consequently, the Commission decided there was no public policy reason sufficient to preclude entities licensed to operate domestic fixed satellites on a common carrier basis from later changing the status of their facilities and offering them on a non-common carrier basis. Subsequent to this decision, the Commission has applied its regulatory policy of forbearance to non-dominant satellite common carriers.[22]

9. It is interesting to note that in the three years since transponder sales was first adopted, there has not been a wholesale abandonment of the offering of transponders on a common carrier basis. The amount of authorized in-orbit domestic fixed satellite capacity has increased substantially and more than 70% of all capacity continues to be offered on a common carrier basis.[23] One explanation may be that to the extent disadvantages are associated with common carrier status, these have been ameliorated by our forbearance treatment of the fixed satellite industry. We now propose to extend those policies to MDS.

V. DOMINANT/NON-DOMINANT COMMON CARRIERS

10. For those licensees that choose to provide service on a common carrier basis, we propose that they be classified "non-dominant" for regulatory purposes. In the Competitive Carrier Docket.[24] the Commission found that inferences aobut a firm's

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[20] Domestic Fixed-Satellite Transponder Sales, 90 F.C.C. 2d 1238, 1251 (1982), *aff'd sub nom.* Wold Communications, Inc. v. FCC, 735 F.2d 1564 (D.C. Cir. 1984). The court concluded that "the public interest touchstone of the Communications Act, beyond question, permits the FCC to allow the marketplace to substitute for direct Commission regulation in appropriate circumstances."

[21] 90 F.C.C. 2d at 1252.

[22] Competitive Common Carrier Services, (Fifth Report & Order), 98 F.C.C. 2d 1191 (1984).

[23] Ford Aerospace Satellite Services, FCC 85-413 (released August 29, 1985), at n. 5.

[24] Competitive Common Carrier Services, 85 F.C.C. 2d 1 (1980), (First Report & Order), *modified*, 91 F.C.C. 2d 59 (1982) (Second Report & Order), *further*

market power can be made by considering a variety of factors, including a firm's ability to exercise control over prices and its ability to cross-subsidize among services. The concept of market power also focuses on the ability of a carrier to change and maintain supra-competitive prices. Further indicia of a firm's market power include considerations of the level and change in its share of the relevant product and geographic market, the number and size of competing firms, the nature of barriers to market entry, and the close demand and/or supply substitutability for a firm's product.[25] A firm that possesses market power is able to engage in unreasonable price discrimination and other anticompetitive practices inconsistent with the public interest. This may entail setting prices above competitive costs in an attempt to earn supra-competitive profits, or setting prices below competitive costs to impede entry by new competitors, or to eliminate exisiting competitors.[26]

11. Firms that possess market power are classified as "dominant" common carriers and are subject to the full panoply of tariff and facilities regulations. On the other hand, carrriers found to be non-dominant are considered to lack market power and are subject to either a "streamlined" or "forbearance" regulatory approach. The Commission has reasoned that the imposition of the full Title II regulatory burdens on non-dominant carriers is not necessary because market forces will serve to prevent these carriers from engaging in unjust and unreasonable price discrimination and other anticompetitive practices inconsistent with the public interest. Firms lacking market power are not in a position to set prices for their offerings in such a way as to contravene the just and reasonable standard of Sections 201(b) and 202(a) of the Act. A firm that charges unreasonably high rates or imposes unreasonable terms or conditions for its offerings would lose its market share because its customers would seek out competing service providers that make their offerings available at reasonable terms and prices.[27]

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modified, 93 F.C.C. 2d 54 (Third Report & Order), *further modified*, 95 F.C.C. 2d 554 (1983) (Fourth Report & Order), *further modified*, 98 F.C.C. 2d 1191 (1984) (Fifth Report & Order), *further modified*, 57 Rad. Reg. 2d (P&F) 1391 (1985) (Sixth Report & Order) *vacated sub nom.* MCI Telecommunications Corp. v. FCC, No. 85-1030 (D.C. Cir. July 9, 1985) [hereinafter referred to as "Competitive Carrier"].

[25] Competitive Carrier, 95 F.C.C. 2d at 562-63.

[26] Competitive Carrier, 85 F.C.C. 2d at 21.

[27] *Id.* at 31.

12. *Video Entertainment Marketplace.* Viewing MDS from the perspective of its predominant use, it is a service primarily used for the transmission of video entertainment programming. The demand for video entertainment programming has been substantial.[28] The relevant MDS product market is determined by considering the alternatives available to a programmer for the distribution of its offerings. Alternative distribution methods capable of offering video entertainment programming in competition with MDS include cable television, low-power television stations (LPTV),[29] domestic fixed satellites,[30] and theatrical pay-per-view. Each medium is capable of being used to meet the increased demand for video entertainment programming. In many instances, all these services compete or will compete with commercially supported over-the-air television which offers a number of channels for the transmission of programming. Video entertainment programming is also being distributed through the use of non-transmission media such as video cassettes.[31] In addition to the intermodal competition received from other services, MDS will also receive competition from other MDS licensees. There are two single-channel and two four-channel MDS groups in each market. In addition, other competitors may elect to lease excess capacity from ITFS licensees for commercial purposes,[32] as well as utilize OFS frequencies for video transmission.[33] Consequently, we con-

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[28] MMDS Reallocation Plan, 94 F.C.C. 2d 1203 (1983).

[29] See generally 47 C.F.R. § 74.701 *et seq.*; An Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications Sys., 51 Rad. Reg. 2d (P&F) 476 (1982).

[30] For example, in 1982, GTE Satellite Corp. (GSAT) proposed to sublease transponder capacity on a Canadian Telesat Anik-C satellite to United Satellite Television (USTV). USTV intended to use the capacity to transmit video entertainment programming to small cable television systems, hotels, motels, hospitals, LPTV, STV, and MDS stations, as well as single and multiple unit dwellings. *See* GTE Satellite Corp., 90 F.C.C. 2d 1009 (1982), *reversed in part on other grounds sub nom.*, United States Satellite Broadcasting Co. v. FCC, No. 83-1692 (D.C. Cir. July 24, 1984). Nevertheless, this venture proved not to be successful and service was terminated on April 1, 1985.

[31] Community Cable TV, Inc., 95 F.C.C. 2d 1204, 1216 (1983); Amendment of Sections 73.35, 73.240 and 73.636 of the Comm'n's Rules relating to Multiple Ownership of AM, FM and Television Broadcasting stations (Notice of Proposed Rulemaking), 95 F.C.C. 2d 360, 375-76 (1983); DBS Order 90 F.C.C. 2d at 680; Amendment of Part 1 of the Comm'n's Rules to allow for Selection from among Mutually Exclusive Competing Applications using Random Selection or Lotteries instead of Comparative Hearings (Notice of Proposed Rulemaking), 88 F.C.C. 2d 476, 478-79 (1981).

[32] ITFS licensees are permitted to use excess capacity on each ITFS channel to transmit non-ITFS material, provided they preserve and utilize a minimum number of hours per week and per weekday on each channel for ITFS service. 47 C.F.R. § 74.931(e).

[33] *See supra* note 19.

clude that suppliers of subscription programming have a variety of alternatives available to accomodate the distribution of video entertainment programming. Although each of the media discussed has different characteristics, these differences do not require treatment as distinct relevant product markets or submarkets. In addition, entry barriers that affect supply substitutability are low for MDS. For example, the capital costs associated with an MDS venture do not serve as a significant barrier to market entry. The estimated cost of a single-channel MDS system is approximately $25,000 to $35,000. Proposed estimates for a four channel MMDS facility are between $125,000 and $150,000. While there may be some limits to the supply substitutability for video entertainment programming, there is a sufficient demand or supply linkage to justify its treatment as a single product market.

13. The relevant geographic market of a product stems from considerations of the geographic location of those who provide competitive distribution services or those who may be able to affect the prices charged by MDS carriers. Each MDS station provides essentially a local distribution service. As a local delivery system, industry estimates reveal that MDS provides a small percentage of the local distribution of premium pay televison programming. For example, in General Docket Nos. 80-112 and 80-113, Microband Corporation of America (Microband) submitted figures which indicate that a total of 12,881,000 subscribers or 15% of all American television households received one or more premium pay television service. Of these households, approximately 11,320,000 (or 87.9%) subscribed to cable television systems, whereas 1,082,000 (or 8.4%) subscribed to STV, and only 479,000 (3.7%) subscribed to MDS. Based on these projections, Microband estimates that by the year 1990, there will be 43 to 56 million subscribers of premium entertainment video programmings, but of those subscribers, only 2 to 6 million will utilize MDS as a means of delivering the programming.[34] These considerations lead us to conclude that MDS licensees will not have market power in the video entertainment distribution market, and therefore, should be treated as non-dominant carriers.

14. *Non-Video Entertainment Marketplace.* Although MDS is primarily used for the distribution of video entertainment programming, it is also capable of being used as a delivery system

[34] *See* Demand for Multiple Premium Television Channels, II Proposal of Microband Corp. of America in Gen. Dkt. Nos. 80-112 and 80-113, App. B-1, at 1-4 (1981).

for the transmission of non-video entertainment programming. We have noted its ability to transmit business data, video teleconferencing and other forms of high speed computer data. It also may be used as a two-way communications service.[35] In those instances where the service offerings constitute non-video entertainment programming, we believe MDS should also be treated being non-dominant. In the *Fourth Report and Order* in the Competitive Carrier Rulemaking, the Commission noted the availability of many interchangeable substitutes to accommodate the variety of non-entertainment programming services in the marketplace today. Many technologies, such as coaxial cable and fiber optics, Digital Electronic Message Service (DEMS), and satellites are capable of providing voice, data facsimile and other services in competition with each other. The Commission observed that customers tend to "purchase bandwidth capacity, not a service for a specific type of transmission or a service provided by a specific transmission medium .... Customers switch among types of services and suppliers in response to their relative mixes of quality and price".[36] This analysis leads us to conclude that MDS does and will continue to receive substantial competition from other transmission services when it is used to distribute non-video programming services. Therefore, we conclude there is sufficient competition for MDS both in the video entertainment market and the non-video entertainment market to prevent an MDS carrier from acquiring substantial market power and realizing monopoly profits. Consequently, we propose, generally, to rely on competitive market forces in ensure that MDS common carriers fulfill their statutorily imposed obligation to refrain from setting unjust, unreasonable and discriminatory rates for their service offerings and from engaging in other forms of anti-competitive practices.[37]

15. Having concluded that MDS licensees generally should be treated as non-dominant, we must then decide whether to apply a streamlined or a forbearance regulatory approach.

16. The Commission has found that traditional Title II regulation, when imposed on non-dominant carriers, is not only costly, but also may serve to inhibit price competition, the entry of new carriers, new service offerings, marketing innovation, and the overall ability of a firm to respond quickly to market conditions.[38]

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[35] *See* discussion at para. 7.

[36] Competitive Carrier, 95 F.C.C. 2d at 564.

[37] No carrier presently identified as a dominant carrier provides MDS. However, should a dominant carrier obtain an MDS permit, it will be subject to the Commission's regulatory policies applicable to all dominant carriers.

[38] Competitive Carrier, 91 F.C.C. 2d at 65.

We have concluded that the tariff requirements imposed through Section 203 and the entry requirements imposed thorugh Section 214 are not the sole means of ensuring the statutory objectives of just, reasonable and non-discriminatory rates and practices. Carrier and customer complaints may also serve as adequate mechanisms for achieving these statutory obligations.

17. In the past, we have applied streamlined regulation to non-dominant carriers until we make a determination that abuses are unlikely to occur. However, we have stated that forbearance may be extended to non-dominant carriers when we are "reasonably confident that our complaint process and market forces are sufficient to check a carrier's ability to profitably charge unlawful rates."[39] Forbearance treatment as applied to MDS would mean that carriers would no longer be required to file tariffs with the Commission, or comply with the other entry and exist requirements under Title II. The benefits to consumers to be derived from forbearance include a reduction in the costs of service with the resultant possibility of lower rates. Our proposal to extend forbearance to MDS carriers does not affect the licensees' continued obligation to comply with the statutory requirements of Title II, including the setting of just, reasonable, and non-discriminatory rates and non-engagement in anticompetitive practices. As discussed above, our experience wiht the MDS industry suggests that these carriers do not possess the market power, in a competitive market, to set rates in contravention of Title II. We believe that market forces and our complaint process will serve as sufficient checks on those carriers which attempt to engage in impermissible practics. These considerations support adoption of forbearance treatment for both single channel as well as multichannel MDS common carriers.[40]

18. To summarize, we propose to permit MDS licensees to initiate their service offerings on either a non-dominant common carrier basis subject to forbearance or on a non-common carrier basis. Those applicants choosing the status of a non-common carrier will be subject to the same provisions of Part 21 as the common carrier applicants, including the filing of an application for a radio construction permit authorization (FCC Form 435, titled "Application For A New Or Modified Common Carrier Microwave Radio Station Construction Permit Under Part 21").

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[39] Competivie Carrier, 98 F.C.C. 2d at 1199.

[40] A similar approach was taken in the Digital Electronic Message Service. *See* Competitive Carrier Rulemaking Fifth Report and Order, note 27, *supra* at 1205.

However, these applicants would indicate their intention to provide service on a non-common carrier basis.[41] These proposed policies would be extended to single-channel as well as multichannel MDS applicants. Since the adoption of the MMDS reallocation plan, only a few multichannel MDS licenses have been granted; therefore, any change in status from common carrier to non-common carrier should not substantially affect customers. We will require new licensees to select their classification prior to receiving licenses. Existing licensees seeking to change their status from common carrier to non-common carrier will be required to follow the special procedures for discontinuance by non-dominant carriers in Section 63.71 of the Rules, 47 C.F.R. § 63.71. Section 63.71(a) provides that a carrier seeking discontinuance shall file an application for discontinuance with the Commission after notifying, in writing, each affected customer/programmer of the proposed discontinued service. This procedure is to be followed, unless the Commission authorizes, in advance, and for good cause shown, another form of notice. The rule also permits affected customers to file an objection to the application for discontinuance within 15 days after receipt of notification. These comments should specifically address the impact of the proposed discontinuance upon customers, including any inability to secure a reasonable substitute service. Discontinuance authority will be granted automatically within 30 days, unless the Commission otherwise notifies the applicant.[42] These procedures are not at variance with the procedures for voluntary discontinuance contained in Section 21.303(b) of our rules. We ask commenters to address this proposal, and specifically note any public interest detriments that may flow from it.

VI. FIFTY-PERCENT RULE

19. As we stated at para. 3 above, MDS stations may render any kind of point-to-multipoint communications service consistent

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[41] In the event our existing Form 435 is not suitable for non-common carrier applicants, we will consider either revising the current Form or issuing another Form to accommodate the non-common carrier applicants. In addition, as a result of this proposal, the Part 21 rule sections listed in the Appendix to this Notice would be revised or deleted as noted. We invite parties to comment on these proposed changes and to suggest additional sections that may require modification in light of this Notice.

[42] This approach is consistent with that used by the Commission in the past for carriers making the transition from dominant carrier to non-dominant carrier status. In our view, the notice provision described above will provide the customer/programmer with a means by which to be heard if unreasonable hardship would be caused by the transition.

with the Commission's Rules, subject to the limitations of Sections 21.903(b)(1) and (b)(2) ("the fifty percent rule"). Subsection 21.903(b)(1) prohibits a carrier from being substantially involved in procuring, writing or influencing the content of any information transmitted over the service, while subsection 21.903(b)(2) permits an affiliated or related entity[43] to program up to one-half of the total hours of the service rendered. By this NPRM, we assess the continued propriety of subsections 21.903(b)(1) and 21.903(b)(2) for the service as it has developed and in light of our proposed treatment of the service.

20. We believe the fifty percent rule for MDS is no longer necessary in view of the manner in which the service has developed and how we anticipate it will develop in the future. Therefore, we propose to delete Section 21.903(b)(2), the fifty percent rule, from our rules.

21. As we observed above, the usual practice in the MDS industry is for operators to lease 100% of the time and all the capacity to unaffiliated entities, rather than to related parties, even though up to 50 percent of the time and capacity could be leased to related parties. Several commenters in the MMDS Lottery proceeding noted this practice.[44] For example, Contemporary Communication Corporation (CCC), the second largest MDS carrier, stated that "even though Section 21.903(b)(2) permits some affiliated service, CCC is unaware of a single example of such service ever having occured during the ten-year history of MDS".[45] The MDS Industry Association (MDSIA) also commented that it "is not aware of any instance in which an MDS carrier has sought to program any part of its time pursuant to the apparent authorization implied in Section 21.902(b)(2)".[46]

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[43] For purposes of subsection 21.901(b)(2) the term "affiliated" or "related" entity means any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the subscriber, excepting only the carrier-user relationship. Amendment of Parts 1, 2, 21 and 43 of the Commission's Rules and Regulations to provide for Licensing and Regulation of Common Carrier Radio Stations in the Mutlipoint Distribution Service, 45 F.C.C. 2d 616, 618 (1974) [hereinafter referred to as "Licensing and Regulation in MDS"].

[44] In the Further Notice of Proposed Rulemaking, Gen. Docket No. 80-112, 48 Fed. Reg. 49309, we specifically solicited comments on the propriety of the fifty percent rule. While we reviewed all comments submitted, the *MMDS Lottery Order* reserved for this proceeding a fuller discussion of this issue. We have utilized those comments in developing our tentative proposal here and invite all parties to offer additional comments on the propriety of eliminating the fifty percent rule.

[45] Comments of Contemporary Communications Corporation, General Docket No. 80-112, at 13 (November 25, 1983).

[46] Comments of MDSIA, General Docket 80-112, at 19 (November 23, 1983).

Others, such as Western Tele-Communication, Inc. (WTCI), expressed the belief that no valid reason exists for the continuation of the restrictions contained in Section 21.902(b)(2). In particular, WTCI commented as follows.

> Today, 50 percent non-affiliation requirements are not needed, as there are numerous transmission mediums available for the local distribution of communications information (e.g., coaxial cable, DTS-DEMS, short haul microwave, fiber optics, and satellites). Limitations on the types of relationships or customer served by MDS common carriers are not only unnecessary, but they logically can only serve to inhibit the full and flexible development of those carriers' services.[47]

A similar view was expressed by another commenter, Electronic Missiles & Communications, Inc. (EMCEE). According to EMCEE, the 50 percent rule is no longer necessary as a means of safeguarding the common carrier status of MDS.[48] Both EMCEE and WTCI believe the Commission has sufficient regulatory tools, without the 50 percent rule, to ensure the preservation of the common carrier status of MDS. In particular, WTCI cites Sections 202(a), 205, and 208 of the Act to support its contention.

22. We agree that the elimination of Section 21.903(b)(2) is warranted in the context of both single-channel and multichannel MDS. First, it seems that even though MDS licensees could lease up to 50 percent of their systems' transmission capacity to an affiliate, our experience with MDS single channel licensees indicates they have, in fact, not done so. While it is difficult to predict whether this practice will be continued by those multichannel MDS licensees that choose to be common carriers, it, at least, suggests the rule may not be necessary to ensure the availability of transmission time and capacity to users other than the licensee.[49] Second, because of our decision to allow entities to

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[47] Comments of WTCI, General Docket 80-112, at 9 (November 25, 1983).

[48] EMCEE noted that "the 50 percent rule is essentially the embodiment of the notion that a common carrier must principally serve the public rather than its own or closely affiliated private business interests. . . . [T]here is no longer any public interest need for retaining the 50 percent rule' in order to assure that an entity is, in actuality, a common carrier." Comments of EMCEE, General Docket 80-112, at 10 (November 25, 1983).

[49] The fifty-percent rule was written prior to the development of MDS and was derived from Section 21.700 of our rules concerning the use of public point-to-point facilities by cable or "community antenna television" (CATV) systems. The rule was adopted to permit a point-to-point carrier affiliated with a CATV system to use common carrier spectrum to serve that system, provided that at least fifty-percent of the spectrum was used to serve non-affiliated systems. Presumably, this spectrum was needed because the frequencies allocated for this purpose, the Cable Television Antenna Relay Services (CARS), was not adequate. Given the limited amount of frequencies

elect to offer MDS on a common carrier basis or a non-common carrier basis, a party desiring to offer time and capacity to an affiliated entity may do so by indicating that their proposed service offerings will be rendered on a non-common carrier basis. Because licensees wishing to use the facilities for their own purposes may choose non-common carrier status, we would expect those entities that propose to offer MDS on a common carrier basis would not lease transmission time and capacity to an affiliated entity.

23. We also believe the restriction on content control contained in Section 21.903(b)(1) is no longer necessary. First, Section 21.903(b)(1) merely restates the principle that a common carrier's primary responsibility is to provide services "necessary to, and ancillary to, the provision of the communication service offered, without affecting or influencing the content of the information communicated".[50] By defintion, a common carrier makes a public offering of its transmission capacity without exercising control over the content of the message transmitted. As we noted at paragraph 3, *supra*, the choice of the specific intelligence to be transmitted is within the sole responsibility and prerogative of the customer and not the carrier.[51] Second, our proposal to apply forbearance to MDS carriers does not abrogate the licensee's continued obligation to comply with the statutory requirements that common carriers offer their services to the public on a just, reasonable and non-discriminatory basis. 47 U.S.C. §§ 201(a) and

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allocated for rendering common carrier service to the public, coupled with the fact that separate spectrum (CARS) had been allocated for use by CATV systems, we found that it was not unreasonable to require a point-to-point common carrier to make its service offerings available to the public for at least 50 percent of its proposed usage of common carrier frequencies. We stressed the significance to the public of "not having common carrier frequencies taken up by persons serving principally their own businesses. It is important that the development of common carriers serving the public [would] not be blocked or inhibited by the presence in the common carrier bands of persons serving principally their own businesses who have other frequencies allocated for such activities." Community Antenna Television Systems, 1 F.C.C. 2d 897, 901 (1965). *See also* First Report and Order and Further Notice of Proposed Rulemaking (Docket No. 15586), 1 F.C.C. 2d 987, 989–907 (1965); Amendment of Parts 1, 2, 21 and 43 of the Commission's Rules and Regulations to Provide for Licensing and Distribution Service, 45 F.C.C. 2d 616, 618 (1974). The non-affiliation limitation was later adopted for MDS. Although there is no discussion in the text of the reason for adopting the rule, it is apparent that it was to serve as a means of safeguarding the common carrier status of the frequencies allocated for MDS, even though, at the time, the precise use to which MDS would be put was unknown.

[50] Licensing and Regulation in MDS, 45 F.C.C. 2d at 618.

[51] *See also Frontier Broadcasting Co., et. al* v. *J. E. Collier et. al*, 24 F.C.C. 251 (1958).

201(b). By our forbearance approach, we are relying upon market conditions and competitive forces to ensure that these statutory obligations are met. The licensee's failure to comply with these requirements may subject it to our complaint process and ultimately to the loss of its customer to competing entities. For these reasons, we also propose to delete Section 21.903(b)(1) from our rules.

VII. CONCLUSION

24. We believe the public interest will be served by our proposal to delete both the fifty percent rule, Section 21.903(b)(2), and Section 21.903(b)(1). In addition, we intend to permit MDS licensees to choose whether they wish to offer MDS on a non-dominant common carrier basis subject to forbearance or as a non-common carrier. This action will encourage the Commission's goal of promoting the efficient use of spectrum and encourage the maximum economic development of MDS technology to meet the changing needs of a competitive marketplace. We invite all interested parties to comment on all aspects of these proposals.

VIII. REGULATORY FLEXIBILITY ACT ANALYSIS

25. In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. § 601 *et seq.*, the Commission issues the following initial regulatory flexibility analysis.

A. Reason for Action. By this NPRM, the Commission seeks to elicit Comments on our proposal to remove programming restrictions currently imposed on MDS carriers. It is our view that such restrictions are no longer necessary to ensure that MDS is operated as a service of common carriage. Moreover, we believe that the proposal will encourage a more efficient use of MDS frequencies both for the transmission of video-entertainment and non-video entertainment programming.

B. *Objective.* The objective of this action is to delete the programming restrictions applicable to MDS carriers and to maintain the regulatory classification of MDS as a common carrier service.

C. *Legal Basis.* The legal authority for this action is contained in Sections 4(i) and (j) and 303 of the Communications Act, as amended.

D. *Description, potential impact and number of small entities affected.* The impact of the proposed rule changes will remove a significant regulatory restriction now imposed upon both small and large MDS operators. Any economic impact stemming from

this proposal will likely benefit all MDS carriers and encourage the combined development of the service.

E. *Recording, record keeping and other compliance requirements.* None.

F. *Federal Rules which overlap, duplicate, or conflict with this Rule.* None.

G. *Any significant alternatives minimizing impact on small entities.* None.

IX. ADMINISTRATIVE MATTERS

26. In accordance with the applicable procedures set forth in Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, interested parties may file comments on or before June 30, 1986, and reply comments on or before July 15, 1986. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

27. Formal participants shall file an original and 5 copies of all comments, replies, or other documents. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the public who wish to express their interest by participating informally in the rulemaking proceeding may do so by submitting one copy of the comments, without regard to form, provided that, the docket number is specified in the heading. All filings in this proceeding will be available for public inspection by interested persons during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C. 47 C.F.R. § 1.419. For general information on how to file comments, parties should contact the FCC Consumer Assistance and Information Division at (202) 632-7000.

28. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating a substantive disposition of the matter is to be considered at a forthcoming meeting, or until a final order disposing of the matter is adopted by the Commission, whichever

is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person submitting a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously filed written comments for the proceeding must prepare a written summary of that presentation. On the day of that oral presentation a written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally*, Section 1.1231 of the Commission's Rules, 47 C.F.R. § 1.1231.

29. As required by Section 603 of the Regulatory Flexibility Act, we have prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. Written comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis.

30. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements. The proposal will not increase or decrease burden hours imposed on the public.

31. A summary of this Notice will be published in the Federal Register and a copy of this Notice will be sent to the Chief, Counsel for Advocacy of the Small Business Administration pursuant to Section 605(a) of the Regulatory Flexibility Act, 5 U.S.C. § 605(a) (1981).

X. ORDERING CLAUSE

32. Accordingly, NOTICE IS HEREBY GIVEN of rulemaking to amend the Commission's Rules and Regulations in accordance with the rule proposals set forth at the end of this document. Authority for this proposed rulemaking is contained in Sections

4(i) and (j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. § 4(i), 4(j), 303, and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Part 21 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 21--DOMESTIC PUBLIC FIXED RADIO SERVICES
SUBPART K--MULTIPOINT DISTRIBUTION SERVICE

1. Section 21.900 is revised to read as follows:

§ 21.900. Authorizations for stations in this service will be granted to existing and proposed communications common carriers or non-common carriers.

* * * * *

2. Subsection 21.900(c) is amended by deleting the last sentence and modifying it to read as follows:

§ 21.900(c). The public interest, convenience, and necessity would be served by a grant thereof. The applicant shall submit a statement indicating whether service will be provided on a common carrier or non-common carrier basis. In addition, the applicant shall submit a statement indicating whether there is any affiliation or relationship to any intended or likely subscriber or program originator.

3. Section 21.903 is amended to read as follows:

§ 21.903(b). Unless otherwise directed or conditioned in the applicable instrument of authorization, Multipoint Distribution Service stations may render any kind of communications service consistent with the Commission's rules and the legally applicable tariff of the carrier or on a non-common carrier basis.

4. Subsections 21.903(b)(1) and (2) are removed.

5. Subsection 21.903(b)(3) is redesignated subsection 21.903(b)(1) and revised to read as follows:

§ 21.903(b)(1). Unless service is rendered on a non-common carrier basis, the carrier must control the operation of all receiving facilities (including any equipment necessary to convert the signal to a standard television channel but excluding the television receiver); and

* * * * *

6. Subsection 21.903(b)(4) is redesignated subsection 21.903(b)(2).

7. Subsection 21.903(c) is revised to read as follows:

Non-dominant common carriers are required to charge just, reasonable and non-discriminatory rates and are subject to the Commission's complaint process, but are not required to file a tariff with the Commission. Although tariff filings with the Commission are not necessary, those carrier's desiring to file a tariff may continue to do so. In those instances, the carriers tariff shall fully describe the parameters of the service to be provided, including the degree of privacy of communications a subscriber can expect in ordinary service. If the ordinary

service does not provide for complete security of transmission, the tariff shall make provision for service with such added protection upon request.

Construction Permit, Extension of
Construction Permit, Transfer of

Where a third application for extension of time to construct a TV station is filed, the pendency of an assignment application does not automatically entitle the permittee to grant of the extension if no construction has begun and assignment of the permit is not likely to result in the expeditious construction of the station.
—*New Orleans Channel 20, Inc.*

FCC 86-266

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
NEW ORLEANS CHANNEL 20, INC. (WULT-TV) New Orleans, Louisiana	
For Extension of Time to Construct	File No. BMPCT-840710KH
For Assignment of Construction Permit	File No. BAPCT-840727KG

MEMORANDUM OPINION AND ORDER

Adopted: May 20, 1986; Released: May 28, 1986

BY THE COMMISSION:

1. The Commission has under consideration a "Joint Application for Review" filed July 11, 1985, by New Orleans 20, Inc. ("Channel 20") and LeSea Broadcasting, Inc. ("LeSea"). Channel 20 and LeSea protest the June 4, 1985, action of the Chief, Mass Media Bureau ("Bureau") which denied Channel 20's above-captioned application for an extension of time within which to construct television station WULT-TV, Channel 20, New Orleans, Louisiana; cancelled the construction permit; deleted the WULT-TV call sign; and dismissed as moot Channel 20's above-captioned

application for assignment of the WULT-TV construction permit to LeSea. Marvin Gorman Ministries, Inc. ("Gorman") filed an opposition to the Joint Application for Review.[1]

Factual Backgound

2. The WULT-TV construction permit (File No. BPCT-790130LK) was granted on October 10, 1980, following a settlement agreement among three competing applicants; Coastal Television Company ("Coastal"), Crescent City Television Corporation ("Crescent"), and Lester Sumrall Evangelistic Association, Inc. ("Sumrall").[2] The approved agreement provided for the formation by Coastal and Crescent of a joint venture known as New Orleans Area Telecasters ("NOAT"), amendment of Coastal's application to specify NOAT as the applicant, dismissal of Crescent's application without consideration, and dismissal of Sumrall's application in exchange for reimbursement by NOAT of documented expenses incurred by Sumrall in preparing, filing and prosecuting its application. The WULT-TV construction permit specified a transmitter site at the Trade Mart Building, Canal Street, New Orleans, and was to expire on April 10, 1982.

3. NOAT determined subsequently that it lacked the expertise to build and operate WULT-TV successfully in the New Orleans television market and attempted to find an assignee with more experience to commence station construction. On September 4, 1981, NOAT entered into an agreement to assign the WULT-TV construction permit to Dana Broadcasting Corporation ("Dana"). The assignment application was submitted on October 21, 1981 (File No. BAPCT-811021KE), and was granted on January 25, 1982. However, NOAT's assignment of the WULT-TV construction permit to Dana was never consummated.

4. On September 22, 1982, NOAT advised the Commission by letter that it was continuing its efforts to construct WULT-TV. Specifically, NOAT stated that its representatives were then in negotiations for the sale of an interest in the station, and that completion of the sale was expected to result in acquisition of the additional capital needed for completion of construction. On December 3, 1982, NOAT informed the Commission by letter that it had entered into an agreement for the assignment of the

[1] The joint applicants filed a pleading styled "Supplement to Joint Application for Review" on February 11, 1986. While this pleading is unauthorized, its substance is considered herein.

[2] The principal of Sumrall, Lester Sumrall, is also the chairman of LeSea, the proposed assignee of the WULT-TV construction permit.

WULT-TV construction permit to Channel 20 on November 17, 1982. The assignment application was filed December 17, 1982 (File No. BAPCT-821217KS), and disclosed that the proposed assignee, Channel 20, was a newly formed Delaware corporation consisting of three stockholders; Mutual Communications Corporation ("Mutual") (80% of the stock), with Coastal and Crescent retaining 12.25% and 7.75% of the stock respectively. The assignment of the WULT-TV construction permit to Channel 20 was approved by the Commission on March 15, 1983, and was consummated on June 28, 1983.

5. Immediately after the consummation, Channel 20 sought a one-year extension of time within which to construct WULT-TV, and amended the pending extension application (File No. BMPCT-820311KE) to specify Channel 20 as the permittee and note the consummation of the WULT-TV construction permit assignment. Channel 20 stated that construction of WULT-TV had not begun because it had no transmitter site. No mention was made of why the originally proposed site (the Trade Mart) was unavailable, or how or when it became unavailable. Channel 20 claimed that the licensee of WGNO(TV), Channel 26, New Orleans, Louisiana, had indicated that its site would be available to WULT-TV, but had advised Mutual at about the same time the WULT-TV assignment was consummated that the WGNO(TV) site was in fact not available. As a result, Channel 20 indicated that Mutual, as majority stockholder of Channel 20, was actively and diligently undertaking the search for a new transmitter site. It further stated that Mutual had on several occasions sent its principals or consultants to New Orleans to investigate transmitter sites; had commissioned its consulting engineer to analyze available sites within a 25-mile radius of New Orleans; had contacted New Orleans television licensees and permittees in an effort to secure joint use or joint construction of towers; and had made an offer to construct jointly a tower with another, unnamed, broadcast permittee. Channel 20 related that equipment and tower construction estimates had also been received from manufacturers. The extension application was granted on August 9, 1983, and gave Channel 20 six months, or until February 9, 1984, to construct WULT-TV.

6. Channel 20 applied for a further nine-month extension of time within which to construct WULT-TV on January 10, 1984 (File No. BMPCT-840110KF). In a supplemental exhibit, Channel 20 stated that after "intense" efforts to secure a transmitter site, it had two possible solutions to its problems. Channel 20 first

declared that it had recently learned of land in a New Orleans industrial park on which it might be able to construct a transmitter tower for WULT-TV; that representatives of Channel 20 would be visiting the land immediately; that it was optimistic the land would be suitable for its site; that it had been furnished with a proposed agreement to purchase that land; and that it hoped to sign a contract for the land in February 1984. In the alternative, Channel 20 maintained that if an agreement on the land could not be reached, it would continue to explore the possibility of securing a joint use agreement with another television permittee or licensee, although it had already had unsuccessfully discussed such agreements with "virtually every established television licensee in the New Orleans area" and believed no existing tower would support another antenna. Finally, Channel 20 stated that it believed it could lease space on a proposed new tower which was to be built by the unnamed permittee of a new Channel 38 station, in "the unlikely event" that it could not build its own tower on the industrial park site. Channel 20 also represented that it had made numerous contacts with unnamed equipment suppliers and sources of financing, that it was "confident that once a site is located, all necessary equipment and financing can be obtained within a short time," and that it could put WULT-TV on the air expeditiously if the extension was granted.

7. A six-month extension of the WULT-TV construction permit was granted on February 8, 1984, with the requirement that an interim progress report be submitted by May 9, 1984. Channel 20 responded in a two-page letter on May 9 that it had continued to pursue both the industrial park site and the possible joint use agreements with other licensees and permittees mentioned in its January 1984 extension request. Channel 20 further informed the Commission that, due to the drain on its time and resources and its lack of success in procuring a transmitter site, its principals determined the best way to assure construction of WULT-TV was to assign the permit to another entity. Channel 20 advised that it had already reached an agreement in principle to assign the WULT-TV construction permit to another corporation, and anticipated filing an assignment application before May 31, 1984.

8. No assignment application was filed by May 31. Instead, Channel 20 filed on July 10, 1984, the application now before us for a further seven-month extension of time within which to

construct WULT-TV.[3] Channel 20 represented in the extension application that no orders for equipment had been placed, that no equipment had been delivered and that no installation had commenced. In its accompanying exhibit, Channel 20 reiterated the statements made in its May 9 letter regarding its inability to find a transmitter site and its reasons for seeking assignment of the WULT-TV construction permit. Channel 20 further stated that the proposed assignee, which was then unnamed, had authorized Channel 20 to represent to the Commission that the assignee was in the process of acquiring a new transmitter site, and expected to be able to specify that site in the very near future; that the assignee would begin construction of WULT-TV immediately after the assignment was consummated; and that the assignee would make every effort to complete construction of WULT-TV within the extension period. Channel 20 also maintained that the public interest would be served by grant of the extension and forthcoming application for assignment of the WULT-TV construction permit, since denials of these applications would result in further delays in the initiation of service on WULT-TV to the detriment of the citizens of the New Orleans area.

9. The application for assignment of the WULT-TV construction permit from Channel 20 to LeSea was filed on July 27, 1984. Channel 20 represented that construction of WULT-TV had not commenced. In the assignment application, Channel 20 sought Commission approval for reimbursement of $151,188.28 to Coastal and Crescent, which included the $120,000 paid to NOAT (the Coastal/Crescent joint venture) in the first assignment of the WULT-TV construction permit. The assignment application also provided for reimbursement of $61,000 to Mutual for expenses incurred during the period in which Channel 20 was the permittee. The underlying sales agreement provided for payment by LeSea to Channel 20 of a maximum of $250,000 in reimbursable expenses.

10. Gorman petitioned to deny Channel 20's extension request on August 17, 1984. Horizon Broadcasting, Inc. ("Horizon"), an affiliate of Gorman, petitioned to deny the assignment application of September 6, 1984.[4] Gorman claimed standing to file its

[3] Channel 20 stated that the filing of the assignment application was delayed due to differences between the parties and to the proposed assignee's absence from the country until July 17, 1984. The assignment application was eventually filed on July 27, 1984. *See* para. 9, *infra.*

[4] Gorman and Horizon will be referred to collectively as "Gorman" for clarity.

pleadings on economic grounds, citing its active involvement in broadcasting and its attempts to find local television outlets for the programming it produces.[5] Substantively, Gorman contended that Channel 20 had ample time in which to secure a transmitter site but had made little effort to do so, in spite of receiving two previous extensions of time to find a site. Gorman alleged that Channel 20 had not been diligent in its efforts to secure a site, and that Channel 20's assertion of diligence in attempting to find a site lacked credibility. Gorman stated that several of its officers knew of available transmitter sites. Moreover, Gorman maintained it was unreasonable to believe that a site could not have been secured in light of the facts that two of Channel 20's principals, Coastal and Crescent, have been holders of the WULT-TV construction permit (as the original permittee, NOAT) since the station was first authorized in 1980, and that ten full service television applicants in the New Orleans Channel 49 comparative proceeding have specified available sites. Gorman also argued that the public interest had been undercut by Channel 20's continuing attempt to hold onto the WULT-TV construction permit without ever building the station, since that failure to build has removed the channel from the community and prevented any other party from applying to use it. Under these circumstances, Gorman declared that Channel 20 was not entitled to yet another extension of time and should not be allowed to profit from the sale of the WULT-TV construction permit which would result if the Commission granted the requested extension.

11. Channel 20 filed oppositions to both Gorman petitions, arguing they should be dismissed as defective because petitions to deny do not lie against extension requests or assignment applications. It alleged that, in any event, Gorman lacked standing to file its pleadings under the party-in-interest requirements of Section 309 of the Communications Act of 1934, as amended. Channel 20 further contended that Gorman's substantive objections were not based on the circumstances surrounding its instant extension request, but on earlier granted extension and assignment applications which could not now be revisited. Additionally, Channel 20 maintained that where there has been a firm commitment to construct from a proposed assignee of a television construction permit which would further the early inauguration of UHF television service to a community, the Commission has

[5] Horizon Broadcasting, Inc. is an applicant for a full service television station to operate on Channel 49 in New Orleans. That application is presently involved in a comparative hearing (MM Docket Nos. 84-762 to 84-771).

found the public interest to be served by grant of an extension request and an assignment application. In this regard, Channel 20 declared that LeSea was committed to building WULT-TV. LeSea represented that it had secured a transmitter site and filed an application to modify the WULT-TV construction permit to specify that new site; that it had placed a contingent order for broadcast equipment in the approximate amount of $2,500,000; that it had located a suitable studio site; and that it had reached agreements in principle with individuals who would be WULT-TV's station operations manager and chief engineer. LeSea also stated it hoped to have WULT-TV on the air within seven months after the consummation of the assignment agreement.

The Bureau's Decision

12. On June 4, 1985, the Bureau denied by letter Channel 20's extension application, cancelled its construction permit, deleted the WULT-TV call sign, and dismissed the assignment application as moot. *New Orleans Channel 20, Inc.*, 100 FCC 2d 1401 (MMB, 1985). The extension application was denied because Channel 20 had not shown that its failure to construct WULT-TV was due to causes beyond its control, or that there were other matters which justified the extension. While prior Commission policy considered the pendency of an assignment application and the proposed assignee's commitment to build the station as justification for the grant of an extension of time in some circumstances, the Bureau indicated that since 1981 the Commission has taken a much closer look at extension applications, and the mere filing of an assignment application does not automatically entitle the permittee to an extension of time. In Channel 20's case, the Bureau noted that four years had elapsed since the WULT-TV construction permit was first granted, and the Commission had granted during that time two assignments of the permit, as well as two extension requests made by Channel 20 alone. Despite these extensions, construction of WULT-TV never began and equipment was apparently never even ordered. Finally, the Bureau observed that although the WULT-TV construction permit was assigned to Channel 20 on the assumption that the station would be built promptly, and the last extension application was granted on the premise that its grant would expeditiously result in new television

service to the public, "these expectations have come to nought." 100 FCC 2d at 1404.

The Joint Application for Review

13. In their "Joint Application for Review", Channel 20 and LeSea seek review and reversal of the Bureau's decision. They argue that to the extent on which the Bureau's decision relied on Gorman's allegations that Channel 20 had made little effort to procure a transmitter site, that Gorman's principals knew of available New Orleans transmitter sites, and that Channel 20 would profit from the sale of the WULT-TV construction permit, it was grounded in factual inaccuracies. The joint applicants further contend that the Bureau's denial of Channel 20's extension request failed to articulate how the public interest is better served by cancellation of the WULT-TV construction permit than by allowing its assignment to an entity which has stated that it will expeditiously construct the station, and was inconsistent with other Bureau actions granting extension requests in similar circumstances. Finally, Channel 20 and LeSea complain that the Bureau failed to address Channel 20's argument that Gorman lacked standing to petition to deny the assignment of the WULT-TV construction permit to LeSea.

Discussion

14. Section 73.3534(a) of the Commission's Rules provides that an application for an extension of time within which to construct a broadcast station will be granted only where construction was prevented by circumstances beyond the permittee's control or where there are other matters sufficient to justify the extension as in the public interest.[6] As a result, every extension application arising before December 10, 1985, must be evaluated individually on the basis of the facts proffered by the permittee and the history of the construction permit to determine whether the reason(s) why construction was not completed was beyond the permittee's control or whether there are other reasons to grant an extension of time.

[6] Effective December 10, 1985, Section 73.3534 of the Rules was revised to limit the circumstances in which extensions of time would be granted. Since the third request for extension was filed substantially before that date, it will be considered and evaluated under the previous standard and precedents applied by the Commission determining whether the requested extension would serve the public interest, convenience and necessity.

15. Here, it is clear that nothing in Channel 20's instant extension request justified its grant, and Channel 20 and LeSea offer no new facts which warrant changing the Bureau's ruling on the matter. Contrary to the joint applicants' contention, it is apparent that the Bureau's decision did not rely on Gorman's allegations, although the Bureau did recite their substance. Rather, the Bureau reached its decision on the basis of the facts related by Channel 20 as to the status of WULT-TV's construction during the period in which Channel 20 was the permittee. *See* para. 12, *supra.* The facts in this case indicate that Channel 20 never began construction of WULT-TV. The only actions Channel 20 ever reported that it took in the time it was the permittee of WULT-TV, aside from attempting to locate an antenna site, were making contact with equipment manufacturers and sources of financing. *See* para. 6, *supra.* No evidence that equipment estimates were actually procured, that equipment was actually ordered, or that financing was actually arranged has ever been submitted by Channel 20.

16. The joint applicants intimate that Channel 20's avowed difficulty in finding an antenna site for WULT-TV and the effort which it expended in its attempt justify a third extension of time. We decline to so conclude. Any doubt as to whether the reasons for Channel 20's lack of a transmitter site were within its control is dispelled by examining the record in this case and noting the statements of its principal, Malcolm I. Glazer, before the Commission here and in other proceedings.[7] At the time Channel 20 purchased the WULT-TV construction permit, it represented in its first extension request that it was without a transmitter site. *See* para. 5, *supra.* Channel 20 never indicated precisely why the

[7] We take official notice of Glazer's sworn testimony in a Channel 13, Salt Lake City, Utah, comparative proceeding (MM Docket Nos. 84-101 to 84-106) relevant to Mutual's efforts to find an antenna site for WULT-TV. We do so for the following reasons. Glazer is the sole principal of Mutual, the 80% stockholder of Channel 20 that undertook the effort to procure an antenna site for WULT-TV. Glazer's affidavit, submitted in this case by the joint applicants, was originally submitted in the Salt Lake City comparative proceeding. Salt Lake City Utah TV, Inc. ("Salt Lake"), of which Glazer is the 51% stockholder, had a competing application in that proceeding. During Glazer's testimony in that hearing on August 24, 1984, the presiding Administrative Law Judge expressed interest in the circumstances surrounding Channel 20's failure to construct WULT-TV and its decision to assign the permit, and requested that Glazer submit an affidavit detailing Channel 20's efforts to construct WULT-TV. The affidavit was submitted September 14, 1984, as was Salt Lake's motion to dismiss its application with prejudice. That motioin was granted September 21, 1984.

antenna site specified in the permit, the Trade Mart Building, was not used. Glazer states in his affidavit only that before Mutual purchased controlling interest in the permit, he was "concerned" about the site. However, he stated in the Salt Lake City comparative hearing that he "did not feel [the Trade Mart site] was competitive" and "didn't feel [that site] gave the proper signal" (Tr. 868). Consequently, Glazer's decisions to purchase a station with an undesirable site and not to use that site were business judgments on his part, and actually precipitated Channel 20's search for another transmitter site.

17. It is also indisputable that Channel 20's continued lack of site was not attributable to the actual, physical unavailability of potential transmitter sites, but to Glazer's business decisions to reject sites as undesirable or too expensive and his failures to reach agreements with owners of potential sites. For example, Glazer indicated in his affidavit that the cost of one possible joint venture to construct an antenna tower was "unsatisfactory," that he had rejected several sites as "unacceptable," that "several additional potential sites" were rejected as "unsuitable because of size, location or cost," that the "terms for the purchase of [another potential site] were unacceptable," and that, while there were sites on which WULT-TV's antenna could have been located, none of those sites were "suitable," "could be purchased for a realistic price," and "would result in a competitive television signal." All these statements detail various business judgments made by Glazer in rejecting sites on which WULT-TV's transmitter could have been constructed.

18. It is further apparent that Channel 20's decision to assign the permit was due not only to the drain on Channel 20's time and resources resulting from its attempts to find a transmitter site, its avowed reason for proposing the assignment, but also to Glazer's judgment that the impending commencement of operations by WNOL-TV, Channel 38, as the second independent UHF television station in the New Orleans market represented formidable competition for WULT-TV. Consequently, as Glazer states in his affidavit, "this change of circumstances prompted [Channel 20] to consider whether the construction of the third independent UHF commercial station was economically feasible." When Channel 20 failed to reach agreement on the use of yet another site, Glazer "determined that it would be better to follow through with the proposed sale of the construction permit to LeSea Broadcasting, Inc."

19. Moreover, the fact that Channel 20 proposed to assign the WULT-TV construction permit to LeSea is not an "other matter" under Section 73.3534(a) of the Commission's Rules which justifies grant of its extension application. In the past, where an assignee made a firm commitment to construct expeditiously and where the assignment represented the fastest way to get the station built, the pendency of an assignment application was considered to be such an "other matter." *See, e.g., King Communications, Inc.*, 47 RR 2d 109 (Rev. Bd., 1980). However, as the Bureau correctly noted, after the Board's decision in *King, supra*, notice was given that a stricter stance on granting extensions of time within which to construct would henceforth be taken. *See Revision of Form 301*, 50 RR 2d 381, 382 (1981); *Mekaoy Company (KTIE)*, 48 RR 2d 815 (B/C Bur. 1980); *see also Red Carpet Country Broadcasting Company*, 56 RR 2d 1349 (1984). The Bureau has been evaluating extension applications more closely for some time. *See, e.g., David E. Goff (KOBK(TV))*, 100 FCC 2d 1329 (MMB, 1985). Where, as here, there is a long history of failure to take significant steps to expeditiously construct a station, the mere filing of an assignment application does not automatically entitle the permittee to grant of its extension application.

20. The joint applicants contend, citing *Pan American Broadcasting Corporation*, 65 FCC 2d 684 (Rev. Bd. 1977), that where a firm commitment exists from a proposed assignee to construct a station, and where assignment of that permit would increase the probability of early inauguration of UHF television service to a community, the public interest has been found to be served by the grant of an extension of time. While LeSea stated that it will make every effort to construct WULT-TV within 210 days of the acquisition of the construction permit, examination of the record in this case casts doubt upon that commitment. We note that the very language of LeSea's representation, that it will "make every effort," falls short of a firm commitment to build WULT-TV promptly. LeSea also represented that it has placed an equipment order for WULT-TV in the amount of approximately $2.5 million, yet has provided no information to demonstrate the firmness of that order, such as the amount of downpayment on the order (if any), whether the downpayment is refundable, or even a copy of the equipment order itself. Such information can be useful in determining the seriousness of a commitment to construct. *See, e.g., Red Carpet Country Broadcasting Company, supra.* Neither

has LeSea submitted any information to show that its putative transmitter or studio sites are actually available.

21. Moreover, the fact that WULT-TV is authorized to operate on a UHF television channel provides no reason to grant an extension here. In the past, grants of extension applications for this reason were premised on concern for the viability of the UHF television service. *See Pan American Broadcasting Corporation, supra.* However, we have since determined that the UHF television service is generally successful and viable. *See Improvements to UHF Television Reception*, 90 FCC 2d 1121, 1124-6 (1982); *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 58 RR 2d 1137, 1185-6 (1985). Consequently, preferential treatment of Channel 20's extension and assignment applications is not warranted merely because the station in question is authorized to operate on a UHF frequency. In light of the record in this case, we cannot conclude that assignment of the construction permit would be in the public interest. Assignment of the permit likely would not result in the expeditious construction and operation of WULT-TV, or contribute to an overall environment in which construction permit holders are encouraged to make and fulfill realistic commitments, thereby bringing service to the public at the earliest possible date. In such a situation, it is preferable to cancel the authorization, thereby opening the door for other qualified applicants.

22. We now turn to the joint applicants' remaining assertions. Channel 20 and LeSea maintain that this case was treated differently by the Bureau than allegedly similar situations involving full service television stations KTCT(TV), Channel 47, Tulsa Oklahoma, WINT-TV, Channel 20, Crossville, Tennessee, and WLLA(TV), Channel 64, Kalamazoo, Michigan. This argument is unavailing, as the facts in those cases differed substantially from the facts here. Since the KTCT(TV) construction permit was granted in 1981, one short-form assignment of the construction permit was granted. Additionally, two transfers of control of the permittee were granted; one was consummated, the other was not. Extensions were granted to the KTCT(TV) permittees because, in contrast to the instant situation, alternative transmitter sites were promptly procured, equipment was ordered and construction was proceeding. Indeed, KTCT(TV) is now an operating station;

its license to cover was granted on November 26, 1985.

23. WINT-TV is a licensed station; the extensions of time granted there related to applications for assignment of the license and for modifications to its facilities. In denying reconsideration of its grant of those applications, the Bureau stated that a *bona fide* concern to restore this broadcast service had been shown, and that the assignee would proceed diligently with resumption of broadcast operations and complete construction of the station's proposed permanent facility. *WINT-TV, Inc.*, Mimeo No. 2402, released February 6, 1986 (MMB). Moreover, the failure to construct those modified facilities would not free the channel for application by other parties.

24. Finally, the situation involving the WLLA(TV) construction permit is readily distinguishable from the instant case. Grants of a first extension application and assignment application were temporarily deferred due to the addition of character issues in another proceeding against principals of the proposed assignee, but were eventually granted. However, the assignment was never consummated because United Press International disposed of its interest in the proposed assignee. The WLLA(TV) permittee then agreed to sell the permit to Christian Faith Broadcast, Inc. ("Christian Faith"), and filed an assignment application and a second extension application. Those applications were granted because, unlike the case now before us, Christian Faith pledged to construct the station by a fixed date, provided a construction schedule, ordered equipment and placed a substantial downpayment on that equipment.

25. The joint applicants also contend that the Bureau should have dismissed Gorman's petition to deny the assignment application as defective, since such petitions do not lie. However, Gorman's petition was moot, since the assignment application which is petitioned to deny was dismissed as moot at the same time the extension application was denied.

26. Based on the foregoing discussion, we believe the Bureau fully considered and properly decided the matter. Consequently, the "Joint Application for Review" will be denied.

27. Accordingly, IT IS ORDERED, That pursuant to Section 1.115 of the Commission's Rules, the "Joint Application for Review" filed by New Orleans Channel 20, Inc. and LeSea Broadcasting, Inc. IS DENIED.

28. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of this *Memorandum Opinion and Order* by Certified

Mail — Return Receipt Requested to the parties named herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Educational Noncommercial FM Station
Microwave, Relay Facilities
Rulemaking, Notice of Proposed

Notice of Proposed Rulemaking adopted seeking to amend the rules to permit noncommercial educational FM translators to rebroadcast signals that are relayed by satellite or terrestrial microwave facilities. Notice issued in response to Petition for Rule Making filed by Moody Bible Institute of Chicago.
—*Noncommercial FM Translators*
MM Docket No. 86-112

FCC 86-147

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 74 of the Commission's Rules to Provide for Satellite and Terrestrial Microwave Feeds to Noncommercial Educational FM Translators	MM Docket No. 86-112 RM-5219

NOTICE OF PROPOSED RULE MAKING

Adopted: April 3, 1986; Released: April 16, 1986

BY THE COMMISSION: COMMISSIONER QUELLO ISSUING A SEPARATE STATEMENT.

Introduction

1. By this *Notice of Proposed Rule Making (Notice)*, the Commission proposes to amend its rules to permit noncommercial educational FM translators to rebroadcast signals that are relayed by satellite or terrestrial microwave facilities. This notice is issued in response to a Petition for Rule Making filed by the Moody Bible Institute of Chicago (Moody) on October 31, 1985 (RM-5219).

Background

2. FM translators are frequency conversion devices that receive the signal of a full-service FM broadcast radio station directly through space, amplify that signal and convert it for simultaneous rebroadcast on a different frequency to a community that is otherwise unable to receive the primary station. As provided in Section 74.1231 of the Commission's rules, FM translators are authorized for the purpose of extending radio service to areas that are unable to receive satisfactory service by reason of distance or unfavorable terrain.[1] In this respect, translators may extend service beyond the normal service area of the primary station. These facilities may be licensed to any qualified individual, organized group of individuals, local civil government body, and with certain limitations, broadcast station licensees.[2] With the exception of emergency broadcasts and the acknowledgement of financial support, translators are not permitted to originate programming.

3. On May 27, 1981, the Moody Bible Institute petitioned the Commission to amend its rules to permit expanded service for all FM translators.[3] The Commission denied this petition in a *Memorandum Opinion and Order* in Docket No. 19918 (*Order* in Docket 19918), adopted on April 11, 1984, 98 FCC 2d 35. In denying Moody's petition, the Commission stated that while the proposal, particularly that aspect relating to satellite and microwave feeds, had potential benefits, it was not the appropriate time to undertake a significant expansion of FM translator service. The Commission concluded that to expand the FM translator authority at this time, even on a limited basis, would increase the interest in such stations and would impact a part of the spectrum

[1] *See* 47 CFR § 74.1231.

[2] *See* 47 CFR § 74.1232. This section of the rules also provides that an FM translator license will not be granted to commercial FM licensees, or any party who receives financial support from such an FM broadcast station licensee, if the translator is intended to provide service to places beyond the predicted 1 mV/m field strength contour of the primary station and within the predicted 1 mV/m field strength contour of another commercial FM station assigned to a different community.

[3] Moody's 1981 proposal included the following requests: (1) permit all FM translators to receive programming fed by satellite or microwave facilities; (2) allow FM translators to originate unlimited amounts of local and recorded programs; (3) authorize FM translators in all areas of the country with a uniform 10 watts transmitter power; (4) permit licensees of FM translator stations to use TV auxiliary microwave channels on a secondary noninterference basis for extending the programming of the primary stations to locations beyond the normal reception range of the primary FM stations; and (5) allow licensees of FM translators to obtain programming from alternative sources.

which had significant existing problems. The Commission noted in that decision that sound spectrum management required that three pending rule makings be resolved before the extension of translator service could be considered.[4]

4. In the petition now before us, Moody requests that the Commission amend its rules to permit noncommercial educational FM translators to receive signals fed by satellite or terrestrial microwave facilities. Moody proposes that this expanded authority be limited to the rebroadcast of the parent station on its owned and operated translators. The petitioner also proposes that the authority for use of microwave and satellite feeds be limited to noncommercial FM stations with translators assigned to noncommercial educational reserved channels (Channels 200 - 220).

5. Moody states that the current rules arbitrarily limit the potential service areas of noncommercial FM translators and that valid reasons exist to eliminate these restrictions. Moody notes that the pending proceedings that led to the denial of its earlier petition have now been resolved. In support of its petition, Moody comments that the use of microwave and satellite technology would allow the reception of a superior quality signal at a noncommercial translator's head-end and thereby improve the quality of the signal that is to be rebroadcast. Moody submits that allowing satellite and microwave feeds to translators would eliminate the need for expensive, cumbersome antenna systems. It states that signals transmitted by satellite or microwave also could be received in more remote areas. Moody explains that the ability to extend service in this manner would benefit the public by making available radio service in such underserved areas. Moody further submits that the savings in antenna systems could be used to enhance the programming service itself and add to the diversity of voices available to radio listeners. Accordingly, Moody believes its proposal is consistent with the overall goals of the Commission regarding the provision of service by noncommercial educational translators.[5]

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[4] These proceedings concerned: 1) interference to television channel 6 by noncommercial FM stations (Docket No. 20735); 2) changes in the commercial FM allocation technical standards (BC Docket No. 80-90); and, 3) implementation of changes in the commercial FM Table of Allotments (MM Docket No. 84-231).

[5] Moody also notes that the Commission previously premised its FM translator rules on those for television translators because of the similarity of these auxiliary services. It states that when the Commission amended its television rules to permit microwave and satellite distribution of signals, it unexplainably did not institute the corresponding amendments to the FM translator rules. *See*

6. The Commission received six comments regarding Moody's petition and a response from Moody.[6] In comments supporting Moody's proposal, Family Stations, Inc. (Family), states that permitting noncommercial educational FM translators to receive programming from a variety of sources would increase the diversity of educational programming available in areas currently unserved and underserved. Also, Family notes that satellite and microwave feeds would be able to overcome the limitations inherent in over-the-air transmission. Northern Michigan University (NMU) and KPSI Radio Corp. (KPSI) support Moody's proposal in part. In its submission, NMU stresses the importance of local radio service and states that it would be sufficient to allow terrestrial microwave delivery of an FM signal to a noncommercial educational FM translator to meet Moody's goal. NMU believes that random program delivery to distant translators by satellite would be contrary to the concept of local radio service. KPSI comments that the use of satellite and microwave feeds should be restricted to situations where the parent noncommercial educational FM station can demonstrate to the Commission that a bona fide need for the proposed translator service exists.

7. The National Association of Broadcasters (NAB) and National Public Radio (NPR) oppose Moody's proposal because they believe that recent regulatory actions have not rendered moot the public interest, allocations policy and administrative considerations that lead to the rejection of Moody's earlier petition. The National Radio Broadcasters Association (NRBA) also argues against Moody's proposal. NRBA states that amending the rules would enable primary stations to extend their coverage into areas they are not licensed to serve and for which they would have no legal responsibility in terms of meeting local community needs and interests. NAB, NPR and NRBA express concern that implementation of Moody's suggested rule change would impede the development of full-service FM radio.

Discussion

8. The Commission believes that it is now appropriate to consider the Moody Bible Institute's proposal for amending the FM translator rules. We believe that this proposal for limited expansion of FM translator authority offers technical and public

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Report and Order in Docket No. 29539, 67 FCC 2d 209 (1977).

[6] The Commission also received a letter in support of Moody's proposal from Creative Educational Media Corporation, Inc.

interest benefits to licensees and to radio audiences. For the reason described below, we propose to authorize use of microwave and satellite technology for the distribution of programming from a noncommercial educational FM parent station to its noncommercial educational FM translators. We propose to limit this authority to noncommercial educational FM translators. We propose to limit this authority to noncommercial educational FM translator stations owned and operated by the parent station. Further, this authority would only apply in cases where the translators are assigned to channels reserved for noncommercial educational stations (Channels 200 - 220).[7]

9. The Commission recently concluded the related radio proceedings in Dockets Nos. 80-90, 84-231 and 20735 that were in part the basis of our denial Moody's earlier petition in 1984.[8] Two of these proceedings concerned commercial radio. In Docket No. 80-90, the Commission adopted new technical standards for commercial FM broadcast stations. In Docket No. 84-231, modifications were made to the commercial FM Table of Allotments.[9] In Docket No. 20735, the Commission adopted a solution to the problem of interference to television channel 6 caused by the presence of noncommercial educational FM stations.[10] Now that these proceedings have been completed, we believe it is desirable to consider the FM translator matter.

10. We do not believe that the concerns expressed by those opposing Moody's petition are sufficient to preclude further examination of the limited rule modification being proposed. Having resolved several major FM radio matters, we believe there are no further barriers to the consideration of the possibility of authorizing satellite and microwave feeds for noncommercial FM translator service. For several reasons, we do not believe that the proposed change to our rules would impede the growth of full-service radio stations, as the opposing parties argue. Noncom-

[7] However, we do not anticipate waiving the existing translator rules to permit the use of microwave and satellite feeds to translators during the pendency of this rule making.

[8] *See* footnote 4, *supra.*

[9] *See Report and Order* in BC Docket No. 80-90 (*Order* in Docket 80-90), 48 FR 29486 (1983), recon. *Memorandum Opinion and Order* in BC Docket No. 80-90, 49 FR 10260 (1984) and *First Report and Order* in MM Docket No. 84-231, 50 FR 3514 (1985).

[10] This solution, based on a compromise submitted by the affected interests, included a method for determining acceptable noncommercial educational FM facilities within specified interference standards and assigned the responsibility for performing the complaint monitoring to affected television licensees. *See Memorandum Opinion and Order* in Docket No. 20735, 50 FR 27954 (1985).

mercial educational FM translators would continue to be authorized only on a secondary basis as a fill-in service in areas that cannot support full-service stations and only when they would cause no interference to other authorized broadcast stations. Translators also must "give way" when full-service stations are authorized in conflict with the translator. Regarding NMU's suggestion to limit the additional permissible technology to microwave, we believe that the technical differences between satellite and microwave feeds are inconsequential in terms of the policy we are trying to promote. Regarding the concern, expressed by some parties, that primary stations would extend their service areas, we note that this proposal would not alter the Commission's policies for authorizing translators to simultaneously rebroadcast the programming of a specific parent station. A network of only translators will not be permitted.

11. In addition, we do not believe that KPSI's proposal to have each licensee demonstrate its need to use this technology is appropriate on two grounds. First, the case-by-case analysis would be costly in terms of administrative resources. Second, to examine the program content in each case for its relevance to the area served by the translator may require Commission involvement in the constitutionally sensitive area of content evaluation.

12. In view of the considerations discussed above, the Commission believes that it is appropriate to issue a Notice of Proposed Rule Making to seek comments on the proposal for a limited expansion of FM translator authority. Furthermore, we intend that this proposal would have no effect on any other aspect of the permissible service of noncommercial educational FM translators. Accordingly, we propose to amend Section 74.1231 of our rules to effectuate this change in the permissible distribution technology as set forth in the attached Appendix.

13. We note that in order to implement this proposal several related Commission rules also would have to be amended. These changes are necessary to permit noncommercial educational FM stations to receive licenses for the use of aural broadcast intercity relay stations in order to transmit their programming by microwave to their translator stations. The proposed amendments would: 1) expand the definition of an aural broadcast intercity relay station to include reference to its use for the transmission of program material between a noncommercial FM station and its noncommercial FM translator; 2) authorize the transmission of program material between qualified noncommercial stations and their translators; 3) modify the licensing requirements for such

aural broadcast intercity relay stations; and, 4) require that FM translator and booster transmitting apparatus must be type approved for such use. Accordingly, we also propose to amend Sections 74.501, 74.531, 74.532 and 74.1250 of our rules as set forth in the Appendix.[11]

14. We invite interested parties to submit comments regarding these proposals and their effect on the provision of radio broadcast services.

Regulatory Flexibility Act - Initial Analysis

15. *Reason for Action.* Permitting noncommercial educational FM translators to receive signals distributed by terrestrial microwave or satellite is expected to increase radio service to areas that are currently underserved.

16. *Objective.* The Commission is proposing to modify the types of signals that noncommercial educational FM translators may receive for rebroadcast in order to increase the diversity of radio programming available to segments of the population.

17. *Legal Basis.* The proposed amendment is authorized under Section 303 of the Communications Act of 1934, as amended, which charges the Commission to explore new and improved uses of radio.

18. *Description, Potential Impact and Number of Small Entities Affected.* Modifying the sources of the signals that noncommercial educational FM translators may rebroadcast is expected to benefit licensees and radio audiences. In particular, signals transmitted by satellite and microwave are more dependable than over-the-air transmissions, can reach more distant locations with a high quality signal and are less expensive to distribute. The public will benefit from the availablity of a greater diversity of voices in areas that now lack adequate radio service. We do not know the number of noncommercial educational FM stations that will avail themselves of the opportunity to use these additional technologies for distribution of programming to their owned and operated noncommercial educational translators. However, we do not believe that there will be any unique impact on small entities.

19. *Federal Rules which Overlap, Duplicate or Conflict with this Rule.* None.

[11] We note that the proposed amendment to Section 74.1250 of the rules would allow the use of FM broadcast transmitters under Part 73. We believe that this change would permit greater compatibility between the microwave or satellite transmission and the translator facility.

20. *Significant Alternatives.* The alternative is to maintain the current rule. The Commission believes to do so will hinder the extension of noncommercial radio service to areas that are underserved. Further, the affected noncommercial educational FM licensees will be deprived of the opportunity to use a less costly and better technology.

Procedural Matters

21. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and except for the additional applications expected to be received, the proposed rules would not increase or decrease burden hours imposed on the public.

22. For the purposes of this non-restrictive notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the time a public notice is issued stating that a substantial disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte,* presentation is any written or oral communication (other than formal written comments, pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1201 of the Commission's Rules.

23. Pursuant to procedures set out in Section 1.415 of the Commission's Rules, interested parties may file comments on or before July 1, 1986, and reply comments on or before August 1, 1986. All relevant and timely comments will be considered by the

Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

24. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth above. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the *Notice*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 50 U.S.C. § 601 et seq.) (1981).

25. In accordance with the provisions of § 1.419 of the Commission's Rules and Regulations, an original and 5 copies of all comments, replies, or other documents filed in this proceeding shall be furnished to the Commission. Participants filing the required copies who also wish each Commissioner to have a personal copy of the comments may file an additional 6 copies. Members of the general public who wish to express their interest by participating informally in the rule making proceeding may do so by submitting one copy of the comments, without regard to form, provided only that the Docket Number is specified in the heading. Responses will be available for public inspection during regular business hours in the Commission's Dockets Reference Room (Room 239) at its headquarters in Washington, D.C. (1919 M Street, Northwest).

26. This Notice of Proposed Rule Making is issued pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

27. For further information concerning this proceeding, contact

Marcia Glauberman, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARIO, *Secretary*

APPENDIX

Part 74 of Title 47 of the Code of Federal Regulations is proposed to be amended to read as follow:

1. The authority citation for Part 74 would continue to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. 47 CFR 74.501 is proposed to be amended by revising paragraph (b) to read as follows:

74.501 Classes of aural broadcast auxiliary stations.

* * * * *

(b) *Aural broadcasting intercity relay station.* A fixed station for the transmission of aural program material between radio broadcast stations, other than international broadcast stations, and between noncommercial educational FM radio broadcast stations and their co-owned noncommercial educational FM translator stations.

* * * * *

3. 47 CFR 74.531 is proposed to be amended by redesignating paragraphs (c) through (f) as (d) through (g) and adding new paragraph (c) to read as follows:

74.531 Permissible service.

* * * * *

(c) An aural broadcast intercity relay station is authorized to transmit aural program material between a noncommercial educational FM station and a noncommercial educational FM translator station operating on a NCE reserved channel (Channel 200 to 220) and owned, operated, and controlled by the licensee of the originating NCE FM station.

* * * * *

4. 47 CFR 74.532 is proposed to be amended by revising paragraph (a) to read as follows:

74.532 Licensing Requirements.

(a) An aural broadcast STL or intercity relay station will be licensed only to the licensee or licensees of broadcast stations other than international broadcast stations, and for use with broadcast stations or noncommercial educational FM translator stations owned entirely by or under common control of the licensee or licensees.

* * * * *

5. 47 CR 74.1231 is proposed to be amended by revising paragraph (b) to read as follows:

§ 74.1231 Purpose and permissible service.

* * * * *

(b) Except as set forth in paragraphs (f) and (g) of this section, an FM translator may be used only for the purpose of retransmitting the signals of a primary FM broadcast station or another FM translator station which have been received directly through space, converted, and suitably amplified. A noncommercial educational FM translator station operating on a NCE reserved FM channel (Channel 200 to 220) licensed to the licensee of a NCE-FM station may additionally retransmit the signals of such a primary NCE-FM station which have been received by satellite or terrestrial microwave link.

* * * * *

6. 47 CFR 74.1250 is proposed to be amended by revising paragraph (a) to read as follows:

74.1250 Transmitters and associated equipment.

(a) FM translator and booster transmitting apparatus used by stations authorized under the provisions of this subpart may only use transmitting apparatus that has been type accepted for such use in accordance with Subpart J of Part 2. Translator stations authorized for transmitter output power of 10 watts may also use FM broadcast transmitters notified or type accepted to operate with an output power not exceeding 10 watts under the provisions of Part 73 of the Rules for broadcast stations.

* * * * *

SEPARATE STATEMENT OF FCC COMMISSIONER JAMES H. QUELLO

In re: Amendment of Part 74 of the Commission's Rules to Provide for Satellite and Terrestrial Microwave Feeds to Noncommercial Educational FM Translators.

I support issuance of this Notice of Proposed Rulemaking in response to the petition for rulemaking filed by Moody Bible Institute. Moody Bible has raised some sound arguments for modifying the translator rules to permit use of additional technical means to deliver a noncommercial station's signal to its translator station, and I look forward to reviewing the comments this proposal will no doubt generate.

I would like to note at this time, however, that I shall oppose any effort to extend this proposal beyond the noncommercial FM band. As Moody Bible stated in its petition, the Commission's rules recognize a significant difference between commercial and noncommercial FM translators and their allowable service.[1] That distinction should be retained.

[1] *See* 47 C.F.R. § 74.1232 (1985).

Amendment
Ownership and Managment, Integration of
Site Availability

In proceeding involving three mutually exclusive applications for CP for a new FM station, the Review Board remands proceeding to the ALJ to ascertain whether applicant "losing" transmitter site can show good cause for amendment by showing that it ever had reasonable assurance of the availability of the original site. Since case is being remanded, the Board also raised questions for inquiry concerning whether the other two applicants' integration proposals should be credited.

—*Progressive Communications, Inc.*
MM Docket No. 84-352

FCC 86R-36

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
PROGRESSIVE COMMUNICATIONS, INC. Temple, Texas	MM DOCKET NO. 84-352 File No. BPH-820512AP
Mary McFaddin Pyle, d/b/a MARYMC BROADCASTING CO. Temple, Texas	MM DOCKET NO. 84-354 File No. BPH-820524BB
BELL COUNTY BROADCASTING COMPANY Temple, Texas	MM DOCKET NO. 84-355 File No. BPH-820524BJ
For Construction Permit for a New FM Station	

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 1986; Released: June 2, 1986

BY THE REVIEW BOARD:

1. After a trial-type comparative hearing, Administrative Law Judge (ALJ) Frysiak selected Marymc Broadcasting Co. as the superior applicant for a new FM station in Temple, Texas. *Initial Decision*, FCC 85D-57, released September 6, 1985, para. 32 (ID). At the oral argument on exceptions to the ID, held on February 14, 1986, it became apparent that substantial and material questions of fact remain unresolved regarding whether Marymc ever had reasonable assurance that its proposed transmitter site was available; and whether the integration proposals of the remaining applicants, Progressive Communications, Inc. and Bell County Broadcasting Co., were reasonable and could be effectuated. The applicants were afforded another opportunity to settle the case thus eliminating the need for a remand hearing. No settlement agreement having been reached, after the passage of ample time, we remand the case for further hearing on the issues identified below.

2. Diversification of the mass media of communications, the ALJ held, was not a decisional factor of comparison here because the three applicants have no attributable communications interests. ID para. 26. Participation of ownership in management of the station was the determinative factor. On this factor, both Marymc and Bell County were awarded credit for 100% fulltime integration; and Progressive was a distant third with 57% fulltime and 14% parttime credit. ID paras. 27-30. Marymc was chosen over Bell County because its integration proposal was substantially enhanced by 100% life-long local residence, civic activities, and past broadcast experience. Bell's proposal was slightly enhanced by a 66% owner Mrs. Watts' proposal to move to Temple; but the proposal to move plus the remaining 33% credit for minority ownership, local residence and civic activities was not sufficient to overcome Marymc's superiority for 100% local residence, civic activities and past broadcast experience qualitative enhancements. ID para. 32.

3. *Site Issue*: On several occasions during the hearing, Progressive and Bell County sought enlargement of issues claiming that Marymc did not have reasonable assurance that it could use the same antenna site as that proposed by Progressive atop the Scott and White Hospital. These requests for a site issue were denied

by the ALJ. See FCC 84M-2962, July 2, 1984, and FCC 84M-2999, July 5, 1984; FCC 84M-5225, December 17, 1984. In their exceptions before the Board, Progressive (Br. 1-5) and Bell County (Br. 1-8) renew their claim that Marymc never had reasonable assurance. After we probed this matter at the oral argument the parties were given another opportunity to resolve this issue by pointing to additional evidence in the record. (Tr. 378, 400).

4. Marymc later submitted new affidavits from its principal, Ms. Pyle, and Mr. Clements, the General Counsel of Scott and White Hospital, concerning a meeting on November 12, 1982, during which they discussed Marymc's desire to use the hospital roof for an antenna site. Our review of the record, as supplemented by these new affidavits, establishes that there are outstanding questions of fact regarding whether Marymc ever had reasonable assurance. We agree with the observation in Progressive's comments, filed March 11, 1986, p. 2., that:

> Whatever may have been the subjective state of Ms. Pyle's mind on the date of her meeting with Mr. Clements, there can be no disagreement whatever over the fact that Ms. Pyle had *at best* a reasonable belief that if she submitted a written request for permission to use the hospital roof, that written request would be *considered* by the hospital Board of Trustees at some time in the future . . . (Emphasis in Original)

On December 2, 1982, Ms. Pyle did file a written request to use the hospital site; however, she never received approval. Her recent affidavit indicates that on May 8, 1984, she was notified by the assistant general counsel of the hospital that no action had been taken on her request; thereafter, on May 31, 1984, he informed her that no more requests would be processed but that the hospital "would give any of the applicants an opportunity to discuss placement of an antenna, depending upon which one is approved [by the FCC]." It thus appears from the record as supplemented by Marymc that from the 1982 November meeting until September 25, 1985 (when she was formally notified by the hospital that she could not use the site) Ms. Pyle did not have the type of reasonable assurance required by the controlling Commission precedent.

5. There are numerous ways in which reasonable assurance may be acquired, ranging from entering into a formal option to lease the land to informal discussions with the landowner or an authorized real estate agent which result in a meeting of the minds as to the key lease terms upon which the land will be made available. *Compare Milam and Lansman*, 4 FCC 2d 610 (1966)

(adequate lease option agreement entered into with realtor authorized to lease site on building but not to approve alterations to roof) *with Cannon Communications Corp.*, 101 FCC 2d 169, 173, 58 RR 2d 950, 953 (Rev. Bd. 1985) (agreement to discuss matter further is insufficient), *and Dutchess Communications Corp.*, 101 FCC 2d 243, 252, 58 RR 2d 381, 388 (Rev. Bd. 1985) (landowner's indication of willingness only to *sell* the site is not reasonable assurance of a *lease*). Here Marymc's own affidavits indicate that Ms. Pyle's written request was never approved; nor was there any meeting of the minds as to the essential terms on which the site would be made available. We will therefore frame an appropriate issue to permit resolution of this matter following an evidentiary hearing. In sum, under both recent and older precedent: "Reasonable assurance requires more than a vague . . . ' willingness to deal' is a *bona fide* option holder does not exercise its option." *Houston Family Television, Ltd.*, 101 FCC 2d 676 (Rev. Bd. 1985); *Cannon Communications Corp., supra.* See also *El Camino Broadcasting Corp.*, 12 FCC 2d 25 (Rev. Bd. 1968); *William F. and Anne K. Wallace*, 49 FCC 2d 1424 (Rev. Bd. 1974).

6. After the release of the ID in this case, the hospital informed both Marymc, which had not received prior approval, and Progressive, which had entered into a written agreement and paid consideration, that the hospital's roof could not be used as a transmitter site. Both Marymc and Progressive have sought leave to specify a new transmitter site. We will grant Progressive's unopposed motion for leave to amend filed November 27, 1985, because it has shown compliance with the good cause and unforseeability tests. However, Marymc's petition for leave to amend filed November 18, 1985, will be referred to the presiding ALJ for consideration after the resolution of the site issue. At that point he will be in a better position to decide whether good cause has been shown for the proposed amendment. *See Colorado Television Inc.*, 98 FCC 2d 513, (Rev. Bd. 1984), *rev. den.*, FCC 85-437, released August 6, 1985 ("The chain of good cause has long since been broken, and [the applicant] cannot build upon its shattered residue without passing through the hearing crucible"). *See also Lee Optical and Associated Companies*, FCC 86R-11, released March 12, 1986, para. 7 ("[R]emand posture of this case mitigates the usual disruptiveness to the hearing posed by such amendments").

7. *Other Issues*: Since the case must be remanded on a basic qualification site issue, we will also remand two other factual questions which may ultimately be decisive in the final resolution

of the comparative issue in this case. *See Washington's Christian Television Outreach, Inc.*, 94 FCC 2d 1360, 1367 (Rev. Bd. 1983), and *Guy S. Erway*, 90 FCC 2d 750 (Rev. Bd. 1980). These factual questions, which have emerged from our review of the written and oral arguments, concern specific aspects of the integration proposals of Bell County and Progressive. In essence, these applicants are accused by their competitors of "integration gamesmanship" with inconsistent and unrealistic proposals. See, e.g., Marymc Br. 9–12, and Progressive Br. 18–21. Our review of the record indicates that troublesome factual questions do remain unresolved.

8. First, Bell County received credit for Mrs. Watts proposal to participate fulltime in the management of the station and to relocate her residence to Temple, Texas. Her competitors challenge the reasonableness, consistency and realism of this proposal. They point out that when the application was first filed the company was owned by Mrs. Watts (51%) and her husband, William A. Watts (49%). Later, but before the "B" cut-off date, the ownership was amended so that Mrs. Watts now owns 66 2/3% and Mrs. Steinheimer, 33 1/3%; but it appears that Mr. Watts may still be largely responsible for the finances of the venture. In Bell County's July 1984 written integration statement, Mrs. Watts was proposed as the fulltime General Manager even though she had no prior broadcast experience. At that time Mrs. Watts was 33 years old, the mother of two young children, six months and three years old, and proposed to relocate her home from Houston to Temple, Texas. At the same time, August 27, 1984, in another FCC proceeding her husband was proposing to relocate to Hanahan, S.C., some one thousand miles away. Although her husband's conflicting and inconsistent proposal was eliminated when he signed a settlement agreement on November 30, 1984, there is merit in the suggestion that: "The aid and counsel to be provided by Mr. Watts was a crucial element of Mrs. Watts proposed integration." Marymc Br. 18. This reasonable inference was confirmed by Mrs. Watts' later testimony that her husband would relocate to Temple and assist her in performing her duties. Tr. 35. No attempt was made by Bell County to reconcile the wife's and the husband's inconsistent and conflicting proposals. While the husband later abandoned his proposal in November, the crucial dates fixed for comparative purposes were *July* and *August* of 1984. Accordingly, on remand we expect that these matters will be fully explored by the parties (*see e.g., N.E.O. Broadcasting Company*, 60 RR 2d 125 (Rev. Bd.

1986)) and resolved in the supplemental Initial Decision.

9. Second, Progressive proposed Henry Castillo (42.86%) as the station's "general manager, full time (more than 40 hours per week)." ID para. 8. This proposal was fully credited. *ID* para. 27. In its brief before the Board at p. 5, Marymc points out that:

> Mr. Castillo also intends to retain his fulltime position as professor of English at Temple Junior College (Progressive Ex. 2). During the 9:00 A.M. to 5:00 P.M., Monday to Friday work week, Mr. Castillo's duties at the college will involve a very considerable part of the time (Tr. 224-225, 243, 247). Progressive's principals conceded that the key hours at the station are those 40 hours from Monday to Friday (Tr. 291-92).

At this point we do not have to fully subscribe to all of the implications in Marymc's above contention. Nevertheless, we are concerned by the record which reveals that Mr. Castillo, a fulltime professor with significant professional obligations, also proposes to assume the pivotal general manager role at the station requiring participation "full time (more than 40 hours per week)." The record does not contain any probative and reliable evidence concerning the requirements imposed by Temple Junior College on its fulltime professors, and whether those obligations can be subordinated to the FCC's requirements for fulltime integration credit. *See Knoxville Broadcasting Corp.*, 59 RR 2d 1617, 1625-26 (Rev. Bd. 1986). (Two "fulltime" positions not credited.)

10. In *Central Texas Broadcasting Ltd.*, 90 FCC 2d 583, 585-589 (Rev. Bd. 1983), we did award fulltime credit to an applicant with other professional commitments in the banking and insurance industries. There the applicant had previously curtailed his other obligations to "only 22 hours per month (or a little over 5 hours per week) . . . . " And perhaps more importantly, the applicant had ageed that "If there is a conflict, he will terminate his other [banking and insurance] interests. . . . " 90 FCC 2d at 585-586. Here no such showing has been made. We therefore remand this issue for full exploration at the evidentiary hearing, *Blancett Broadcasting Co.*, 17 FCC 2d 227 (Rev. Bd. 1969); *Lewis Broadcasting Corp.*, 11 FCC 2d 889 (Rev. Bd. 1968), and the issuance of a supplemental Initial Decision.

11. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED for a further hearing in accordance with this opinion and for the preparation of a Supplemental Initial Decision as may be required by the supplemental record;

12. IT IS FURTHER ORDERED, that the issues designated

for hearing are enlarged by the addition of the following issue:

> To determine whether Marymc Broadcasting Co. had reasonable assurance of the availability of a transmitter site during the period December 1982 to September 1985.

13. IT IS FURTHER ORDERED, that the motion for leave to amend filed by Progressive Communication, Inc., on November 27, 1985, IS GRANTED; and that the petition for leave to amend filed November 18, 1985, by Marymc Broadcasting Co. IS REFERRED to the presiding ALJ for further action in accordance with paragraph 6 above.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

FCC 85D-57

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
PROGRESSIVE COMMUNICATIONS, INC. Temple, Texas	MM DOCKET NO. 84-352 File No. BPH-820512AP
Mary McFaddin Pyle, d/b/a MARYMC BROADCASTING CO. Temple, Texas	MM DOCKET NO. 84-354 File No. BPH-820524BB
BELL COUNTY BROADCASTING COMPANY Temple, Texas	MM DOCKET NO. 84-355 File No. BPH-820524BJ
For Construction Permit for a New FM Station	

Appearances

Herbert D. Miller, Jr. on behalf of Progressive Communications, Inc.; *Robert W. Healy* on behalf of Mary McFaddin Pyle, d/b/a MaryMc Broadcasting Co. and *Roy F. Perkins, Jr.* on behalf of Bell County Broadcasting Company; and *Paulette Laden* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
JOHN M. FRYSIAK

Issued: August 29, 1985; Released: September 6, 1985

Preliminary Statement

1. This proceeding involves the mutually-exclusive applications Progressive Communications, Inc. (Progressive); Mary McFaddin Pyle, d/b/a MaryMc Broadcasting Co. (MaryMc), and Bell County

Broadcasting Company (Bell) for a construction permit to build and operate a new FM broadcast station on Channel 269A (101.7 mHz) at Temple, Texas.[1] The applications were designated for comparative hearing by *Hearing Designation Order* of the Commission's Mass Media Bureau, released April 12, 1984 (49 Fed. Reg. 15620, April 19, 1984), on the following issues:

1. To determine whether the proposal of the following applicant(s) would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section: Bell

2. To determine with respect to the following applicant(s) whether, in light of the evidence adduced concerning the deficiency set forth in paragraph 8, the applicant(s) is financially qualified: Temple, Aztlan

3. To determine which of the proposals would, on a comparative basis best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

The *Hearing Designation Order* provided (paragraph 13, page 6) that the areas and populations to be served by the applicants, and the availability of other aural services to those areas, would be considered under the standard comparative issue (Issue No. 3, supra).

2. Issue No. 1 was resolved in the applicant's favor by partial summary decision granted by *Memorandum Opinion and Order*, released August 14, 1984 (FCC 84M-3513). Issue No. 2 was resolved in Temple's favor by partial summary decision granted by *Memorandum Opinion and Order*, released October 15, 1984 (FCC 84M-4416) and, with the dismissal of the application of Aztlan Broadcasting, Inc. (fn. 1, *supra*), was rendered moot. There remain for resolution Issue Nos. 3 and 4.

3. A prehearing conference was held on June 20, 1984. Hearing was held on November 13 and 14, 1984. The record was closed by *Order*, released November 16, 1984 (FCC 84M-4857); the record was reopened, pursuant to permission granted during the hearing,

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[1] The *Hearing Designation Order, infra*, designated for hearing six applicants for the FM channel in issue at Temple, Texas. Three of those applicants, however, were dismissed pursuant to requests of the applicants. *Order*, released August 15, 1984 (FCC 84M-3653), dismissing the application of Aztlan Broadcasting Co., Inc. (MM Docket No. 84-356); *Order*, released November 16, 1984 (FCC 84M-4858), dismissing the application of MCB Broadcasting of Texas, Inc. (MM Docket No. 84-353), and *Order*, released March 5, 1985 (FCC 85M-924) dismissing the application of Temple Broadcasting Co. Inc. (MM Docket No. 84-351).

to receive Progressive Exhibits 11 and 12, and reclosed by *Order*, released December 31, 1984 (FCC 84M-5407). Proposed findings of fact and conclusions were filed on January 28, 1984; replies were filed February 22, 1985.

Findings of Fact

The Applicants

Progressive Communications, Inc.

4. Progressive Communications, Inc. (Progressive), has authorized 100 shares of common voting stock of which 70 shares are outstanding, held by the following in the percentages indicated (Progressive Exs. 1, 9 and 12):

Name and Residence	*No. of Shares*	*Percentage of Voting Stock*
Robert Martin Temple, TX	10	14.29
Henry Castillo Temple, TX	30	42.86
Sammye Davis Temple, TX	10	14.29
John F. Sammons, Sr. Temple, TX	10	14.29
Steve Cannon Troy, TX	5	7.14
Lynn Woolley Temple, TX	5	7.14
	70	

Progressive also has authorized 100 shares of non-voting preferred stock, of which 20 shares are outstanding, held, 10 shares each, by Dan Cutrer and David Johnson, both residents of Dallas, Texas. *Ibid.* No stockholder of Progressive has an interest in any other medium of mass communications (Progressive Ex. 1, p. 3).

5. Pusuant to a Resolution Regarding Bonus Shares of Stock (Temple Ex. 4), adopted prior to the amendment of Progressive's application on September 30, 1982 (Tr. 286), Messrs. Cannon and Woolley may each be granted two shares of Progressive's stock following the end of the first full year of operation of Progressive's proposed station and an additional three shares of stock following the end of the third full year of station operation (Temple Ex. 4).

6. Robert Martin, a Black male, is president of Progressive. Mr. Martin proposes to be public affairs director and minority affairs coordinator part-time (20 hours or more per week) of the station

proposed by Progressive. He will report to the general manager, Mr. Castillo. As public affairs director, Mr. Martin will be responsible for developing public affairs programs and insuring that the station is responsive to community problems, needs and interests. He will maintain contact with members of the community to solicit their views on how the station can provide the best service. As minority affairs coordinator, Mr. Martin will be responsible for all of the station's contacts with the community, including employment relations (Progressive Ex. 3; Tr. 164).

7. Mr. Martin was born in Waco, Texas, in May 1937. He has lived in Temple since 1975. He was a delegate to the State Republican Convention in September 1982 and June 1984. He was a city commissioner of the City of Temple, 1978 - 1984, and mayor pro-tem, 1980 - 1982. He is the representative of the City of Temple to the Central Texas Council on Alcoholism and Drug Abuse, commencing in 1981, and a member of the Governor's Task Force on Small Business, commencing in 1981. He was a co-founder of the East Temple Advisory Committee Dealing with Business and Industrial Matters. He is chairman, 1980 to the present, of the Mayor's Committee to Research Personnel Matters in the City of Temple; member, executive committee, Central Texas Council of Governments, 1980 to the present; member, executive board, Hill Country Community Action Association, 1978 to the present, vice president, Temple Civic League, 1984 to the present; member, Central Texas Private Industrial Council, 1983 to the present; member, Temple Housing Authority, 1984 to the present, and member, Texas Train Festival, 1984 to the present. He was a member, Central Texas Economic Development District, 1979 to 1984 (Progressive Ex. 3).

8. Henry Castillo, a male of Hispanic descent, is vice president of Progressive. Mr. Castillo proposes to be general manager, full-time (more than 40 hours per week) of the station proposed by Progressive. He will be responsible on a day-to-day basis for overall supervision of the operation of the station (Progressive Ex. 2).

9. Mr. Castillo was born in Temple in September 1939. He has lived in Temple since January 1976. He has been employed by Temple Junior College, Temple, since 1976, and currently is a professor of English there; he will continue that employment while working at Progressive's proposed station (Progressive Ex. 2; Tr. 224-6, 279). He was a precinct chairman, Democratic Precinct 303, Temple, commencing in 1980 (Tr. 226-7, 244), and a delegate to the Bell County Democratic Convention in 1980 and 1984 (Tr.

232). He is a charter member, League of United Latin American Citizens (LULAC), Council 642; vice president and member of the board of Child Help, Inc.; member, Law Enforcement Advisory Committee, Temple, for more than two years (Tr. 228-9); member, Civilian Advisory Conference, Fort Hood, Texas, for about three years (Tr. 229-30, 280-1); member, Professional Development Committee of the Texas Junior College Teachers' Association, headquartered in Austin (Tr. 230-1), and head judge, Bell County Spelling Bee, for about five years (Tr. 231; Progressive Ex. 2). He was the host of a Spanish-language program, *Las Mananitas*, 9 - 10:00 a.m., Sundays, broadcast by Station KTEM, Temple, 1978 to September 1982. In the period 1974 to 1976, while living in Dallas, Texas, he was a member of the board of public radio station KCHU, Dallas (Progressive Ex. 2; Tr. 245-6).

10. Sammye Davis, a White female, is secretary-treasurer and a director of Progressive. Ms. Davis proposes to be office manager, full-time (at least 40 hours per week) of the station proposed by Progressive. She will be responsible for "office administration and for supervision of all clerical personnel", reporting to the general manager. Ms. Davis was born in Temple in March 1943. She has lived in Temple since October 1972. She has been employed in various administrative positions since 1976 and is a member of the Seventh Street United Methodist Church (Progressive Ex. 6).

11. Steve Cannon is a director of Progressive. Mr. Cannon proposes to be program director, at least 40 hours per week, of the station proposed by Progressive. He will be responsible for supervising employees engaged in program-related activities and will report to the general manager (Progressive Ex. 4).

12. Mr. Cannon was born in Houston, Texas, in September 1949. He lives in Troy, Texas, within 5 miles of Temple. He is a partner with Mr. Lynn Woolley in Cannon, Woolley & Associates, an advertising agency in Temple (Progressive Ex. 4, p. 1). He is a member of the Temple Chamber of Commerce and served on its Christmas Parade Committee. He is in charge of audio at the First Baptist Church, Temple (Progressive Ex. 4 p. 2). Mr. Cannon was music director and assistant program director, 1972 - 75, and program director, 1975 - 78, at Station KTBB, Tyler, Texas; music director, 1978 - 80 (and announcer, 1979 - 80) at WJBO and WFMF, Baton Rouge, Louisiana; program director, 1980 - 82, at KTEM, Temple; announcer, 1982 - 84, at KHOO-FM, Waco, Texas, and is an announcer, part-time, at Station KTON, Belton, Texas, since October 1984 (Progressive Ex. 4).

13. Lynn Woolley is a director of Progressive. Mr. Woolley proposes to be operations manager, full-time (at least 40 hours per week) of the station proposed by Progressive. He will be responsible for the technical operation of the station and for supervision of employees in their operational duties (Progressive E. 5).

14. Mr. Woolley was born in Temple in December 1949. He has lived in Temple since 1980 (Progressive Ex. 5). He is a partner with Mr. Cannon in Cannon, Woolley & Associates, an advertising agency, Temple. He is a board member, Temple Board of Housing Demolitions and Appeals; a board member and chairman of publicity for the Texas Train Festival; member, Temple Chamber of Commerce, and a member of the Seventh Street Methodist Church, Temple, where he is a member of the administrative board and chairman of pastor - parish relations (Progressive Ex. 5). Mr. Woolley was an outside reporter and nighttime news anchor at Station WFAA, Dallas, Texas, 1972 - 73; news director at KTEM, Temple, 1973 - 74; reporter and afternoon drive anchor at WFAA, Dallas, 1974 - 76; editor for consumer news and assignments editor, KRLD, Dallas, 1976 - 78; morning anchor and news director, KAAM - KAFM, Callas, 1978 - 80; program director and morning announcer, KPLE, Temple, 1980 - 82; morning news anchor and writer, WACO - KHOO, Waco, Texas, 1982 - 84, and an announcer, part-time, at Station KTQN, Belton, Texas, since October 15, 1984 (Progressive Ex. 5).

Mary McFaddin Pyle, d/b/a MaryMc Broadcasting Co.

15. Mary McFaddin Pyle, d/b/a MaryMc Broadcasting Co. (MaryMc) is wholly owned by Mary McFaddin Pyle. She has no interest in any other medium of mass communications (MaryMc Ex. 1). Miss Pyle proposes to be general manager, full-time (more than 40 hours per week), responsible for all aspects of station operation, of her proposed station at Temple (MaryMc Ex. 2).

16. Miss Pyle lived in Temple from 1966, *i.e.*, when she was about 5-1/2 years old, until November 1977 when she had just become 18 years of age. Subsequent to the filing of her application in this proceeding, she returned to Temple and has lived there since December 1982, *i.e.*, a year and eleven months at the time of hearing in this proceeding (MaryMc Ex. 2, Tr. 124, 130). Miss Pyle graduated from Texas A & M College, College Station, Texas, in May 1981 with a bachelor's degree in management. She is employed full-time as office manager of The Ad Agency, Temple, since about July 1984; previously she was

employed part-time there (MaryMc Ex. 2; Tr. 130). Since December 1983, Miss Pyle is a member of the Bell County Media Club, which meets monthly to hear a speaker from some segment of mass media. She served as assistant to the director of public relations of the Greater Temple United Way for two to three months during the United Way campaign in 1983. She is a member of the Industrial Showcase Committee of the Temple Chamber of Commerce which conducts monthly tours of a local plant or business for the benefit of Chamber members (MaryMc Ex. 2, Tr. 131-2). Miss Pyle was office manager at Stations KIEZ and KWIC-FM, Beaumont, Texas, in the period May 1981 - June 1982, supervising all office operations including traffic, personnel records, accounting and customer relations. She also advised her father, who is president of the licensee, Pyle Communications of Beaumont, Inc., and to a lesser degree, the general manager, in matters of programming, finances, etc. (MaryMc Ex. 2; Tr. 132). She completed courses in broadcast management and sales (one course in each) at Central Texas College, Killeen, Texas, in May 1983 (MaryMc Ex. 2; Tr. 130).

Bell County Broadcasting Company

17. Bell County Broadcasting Company (Bell) is owned as follows (Bell Ex. 1; Temple Ex. 3; Bell Ex. 6; Tr. 178 - 82, 188 - 90, 195 - 7):

Name and Residence	*Percentage of Stock*
Teresa L. Watts Houston, TX	66-2/3
Judy Morales Steinheimer Temple, TX	33-1.3

The principals of Bell have no interest in any other medium of mass communications (Bell Ex. 2).

18. When Bell filed its original application before the Commission the sole proposed stockholders were Ms. Teresa L. Watts (51%) and her husband, William A. Watts (49%) (Tr. 36). The perfecting amendment date for the applicants in this proceeding was September 30, 1982 (Tr. 47). On September 27, 1982, Bell filed an amendment purportedly changing its ownership to the present status. Bell concedes that its purpose was to enhance its proposal by securing a minority stockholder of Hispanic heritage (Tr. 39).

19. Teresa L. Watts is the president and a director of Bell. Mrs. Watts proposes to be general manager, full-time (40 hours or more per week) of the station proposed by Bell at Temple, Texas. She will establish her permanent residence in Temple prior to commencement of operation of the station (Bell Ex. 2).

20. Mrs. Watts was born at Levittown, Long Island, New York, in July 1951. She lived at various places in Texas where her father, who was in the military, was stationed, in the period 1953 - 57; commencing in 1959, she lived in Austin, Texas until 1971, and, in the period 1974 to April 1978, in Houston, Texas. Since January 1979, she has lived in Houston. Mrs. Watts graduated from McCallum High School, Austin, Texas, in 1969. She attended Southwest Texas State University, San Marcos, Texas; Virginia Commonwealth University, Richmond, Virginia; the University of Houston, Houston, Texas, and the University of Texas at Galveston, Texas, from which she graduated in August 1976 with a B.S. degree, summa cum laude, in physical therapy. From August 1976 to March 1978, Mrs. Watts was senior physical therapist at Jefferson Davis Hospital, Houston. From February 1979 to September 1979, she was a contract physical therapist consultant with the Cerebral Palsy Treatment Center, Houston. From September 1979 to March 1981, she was a consultant to the Harris County (Texas) Department of Education, Houston, on education and physical therapy for the handicapped; these responsibilities normally required 40 to 50 hours per week of her time (Bell Ex. 2).

21. Judy Morales Steinheimer is vice president and a director of Bell. Mrs. Steinheimer proposes to be program director, full-time (40 or more hours per week) of the station proposed by Bell at Temple. As such, she will be in charge of station operations other than sales and, in particular, in charge of the program and news operations of the station (Bell Ex. 3).

22. Mrs. Steinheimer is a Hispanic person. Her mother, nee Olivia Perez, was born in Mexico of Hispanic parents; her father, Pascual Rios, had Hispanic parents born in Mexico. Mrs. Steinheimer was born in Brownsville, Texas, in August 1941. She has lived in Temple since 1944, and will continue to do so while serving as program director of Bell's proposed station. She graduated from Temple High School in 1959, attended Temple Junior College in the period 1971 - 3, and graduated from Antiock University, Austin, Texas, in 1978, with a masters degree in education (Bell Ex. 3). Commencing in 1972, Mrs. Steinheimer was coordinator of the H.E.L.P. Center, an outreach center of the

Central Counties Center for Mental Health and Mental Retardation, Temple, a mental health center for the poor and minorities. Since about 1975, she has been director of the H.E.L.P. Center, with supervision of about twelve employees and overall responsibility for five public service programs provided by the Center. Her duties normally require a minimum of 40 hours of her time each week. She will terminate her present employment upon assuming her duties as program director of Bell's station, which will be her sole employment from that time forward. Likewise, she will curtail her civic activities to require not more than 8 to 10 hours per week of her time, and further if necessary, not to interfere with the performance of her duties at Bell's station (Bell Ex. 3).

23. Mrs. Steinheimer's civic activities include the following: member, board of directors, Temple Housing Authority, 1983 to the present, and vice chairperson in 1984; founding member and committee chairperson, Temple Mayor's Committee on Employment of the Handicapped, 1981 to present, and chairperson, 1981 - 3; member, September 1984 to the present, Temple Independent School District Vocational Advisory Committee; member, 1980 to the present and past vice chairperson, Temple Independent School District Community Education Advisory Council; member, board of directors, 1977 to the present, and past secretary, Temple Family Service, a United Way agency providing emergency assistance to low-income persons; member, board of directors, 1976 to the present, and secretary in 1984, Senior Citizens, Inc., Temple (providing programs for the elderly); member, board of directors, 1974 to the present, Hill Country Community Action (headquartered in San Saba, Texas), providing programs for low-income and senior citizens including in Bell County; founding member and chairperson of the board of directors, 1963 to the present, Guadalupe Day Care Center, Temple; founding member and board member, 1979 to the present, T.R.U.S.T., Temple (a parent support group for families with disabled youth); member, 1976 to the present, R.S.V.P. (Retired Senior Volunteer Program) Advisory Committee (coordinating placement of senior volunteers in community programs in Bell County); member American G.I. Forum, 1974 to the present, state vice chairperson of the Womens Forum, 1982 - 4, chairperson of the state Womens Forum commencing in July 1984, and secretary-treasurer of the Temple Chapter of the Womens Forum, 1982 to the present; chairperson, Bell County Interagency Council (coordinating services to low-income and elderly persons, serving Belton, Killeen and Temple), 1984; board member, Informed Parents, Temple (an organization

to combat drug use by youth), 1984, and member, Temple Train Festival Committee, 1984. Activities in which Mrs. Steinheimer has been involved in the past are: member, board of directors, Child Care Coordinating Council, Temple (establishing and operating child care centers and after school programs), 1975 - 80; vice chairperson, 1980 - 82, Community Development Advisory Council to the City of Temple (advising on allocations of funds to low-income areas); member, Temple Centennial Committee, 1980, and member, 1975 - 77, and vice chairperson, City of Temple Recreation Advisory Committee (Bell Ex. 3, Attachment B).

Areas and Populations

24. It was stipulated that there is no difference of decisional significance in the areas and populations which the applicants would serve (Joint Ex. 1).

Auxiliary Power

25. Bell, Progressive and MaryMc all propose to use auxiliary power to operate the station during electrical black-outs (Bell Ex. 4; Progressive Ex. 1, p. 3; MaryMc Ex. 3).

Conclusions of Law

Diversification

26. None of the applicants have an attributable interest in any other medium of mass communications. Accordingly, the applicants are comparatively equal under this criterion of the standard comparative issue.

Best Practicable Service to the Public

27. *Progressive.* Progressive claims quantitative integration for for the full-time participation of Henry Castillo (42.86%), Steve Cannon (7.14%) and Lynn Woolley (7.14%). John F. Sammons with a 14.29% ownership interest does not propose to be integrated. Sammye Davis with 14.29% proposes to be a full-time employee but in her role as "Office Manager" no integration credit can be given. The Review Board noted in Apogee, Inc., 57 RR 2d 1585 (Rev. Bd. 1985), "the role of office manager" is non-managerial, and will not be credited. Robert Martin (14.29%) is proposed to be integrated part-time. Thus, Progressive is credited with full-time integration of 57.14% and 14.29% part-time.

28. Messrs. Castillo, Cannon and Woolley (57.14%) are all entitled to credit for local residency. Mr. Castillo (42.86%) is entitled to credit for minority ownership. Messrs. Cannon and Woolley (14.28%) have broadcast experience.

29. *MaryMc.* Ms. Pyle as sole owner will be the station's general manager in charge of all ultimate decision making. Her 100% quantitative integration will be fully credited. Ms. Pyle has been a local resident of Temple for most of her life except for a brief period when at college and one year thereafter. Ms. Pyle is entitled to qualitative credit for civic participation in Temple organizations, such as the United Way, and for past experience.[2]

30. *Bell.* Bell receives full integration credit for 100 percent of its ownership. The integration of Mrs. Watts, 66-2/3 percent owner, is slightly enhanced by her proposal for future residence in Temple. The integration of Mrs. Steinheimer, 33 1/3 percent owner, is substantially enhanced by her local residence, civic involvement, and minority (Hispanic) status.[3]

Auxiliary Power

31. Progressive, MaryMc and Bell are given full credit on this issue.

32. Both MaryMc's and Bell's proposals are superior to Progressive. MaryMc's proposal is superior to Bell's. In applying the qualitative enhancement factors MaryMc is superior to Bell because of Ms. Pyle's present local residency; record of civic participation; and past broadcast experience. Mrs. Watts (66-2.3%) proposes the inferior position of future residency, has no record of civic participation and no broadcast experience. While Mrs. Steinheimer (33-1/3%) has a minority preference, local residency and a record of civic participation, her 33-1/3% integration does not overcome the superiority of Ms. Pyle's 100% qualitative enhancement over Mrs. Watts' 66-2/3%. Thus it is concluded that the application of Mary McFaddin Pyle, d/b/a MaryMc Broadcasting Co. should be granted and the applications of the other parties to this proceeding denied.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the Rules, the application of Mary McFaddin Pyle d/b/a MaryMc Broadcasting Co. (File No.

[2,3] The Commission policy regarding qualitative enhancement for female ownership has been invalidated by the U.S. Court of Appeals in *James U. Steele* v. *Federal Communications Commission*, No. 84-1176, released August 23, 1985.

BPH-820524BB) for a construction permit to build and operate a new FM broadcast station on Channel 269A at Temple, Texas, IS GRANTED and the applications of Progressive Communications, Inc. (File No. BPH-820512AP) and Bell County Broadcasting Company (File No. BPH-820524BJ) ARE DENIED.[4]

FEDERAL COMMUNICATIONS COMMISSION

JOHN M. FRYSIAK, *Administrative Law Judge*

[4] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Deregulation
Satellite Earth Station

Second Report and Order adopted further streamlining the licensing procedure for receive-only earth stations. This action will ease administrative burden on the public and the Commission staff and reflects simplifications in administrative aspects of this procedure resulting from policy determinations in other Commission proceedings.
—*Receive-Only Earth Stations*
CC Docket No. 78-374

FCC 86-133

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Deregulation of Domestic Receive-Only Satellite Earth Stations	CC Docket No. 78-374

SECOND REPORT AND ORDER

(Proceeding Terminated)

Adopted March 25, 1986; Released: April 10, 1986

BY THE COMMISSION:

I. Introduction

1. The Commission began this proceeding to improve the effectiveness of its receive-only earth station licensing program through the elimination of unnecessary regulatory policies. Our *Notice of Inquiry*[1] described the receive-only licensing process and requested comments on the benefits and the detriments of that mandatory licensing program. In the *First Report and Order*,[2] we eliminated the mandatory aspects of the program and adopted the following policies:

[1] Notice of Inquiry, CC Docket No. 78-374, 70 FCC 2d 1460 (1979) (*Notice*).
[2] Deregulation of Receive-Only Earth Stations, 74 FCC 2d 205 (1979) (*Deregulation Order*).

(1) Immediate implementation of a voluntary licensing program for receive-only earth stations;

(2) Complete deregulation under Title III of the Act of unlicensed receive-only earth stations;[3] and

(3) Streamlining of the licensing procedures for those who decide to obtain a receive-only earth station license.[4]

This docket was left open to consider additional improvements to the program.

2. In this *Second Report and Order*, we review the experience we have gained with this optional licensing program since its adoption.[5] We conclude that our experience and Commission decisions in other proceedings provide the bases to eliminate additional application requirements and further simplify our receive-only earth station licensing program.[6]

II. Discussion

3. Our receive-only earth station licensing program is a voluntary one. It is directed towards providing interference protection to receiving facilities intended to serve the public at specific locations. A fundamental part of the licensing program is the frequency coordination process which provides the means for protecting proposed earth station sites from interference caused by terrestrial point-to-point microwave transmitters.[7] We have

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[3] No interference protection is afforded to unlicensed receive-only facilities. However, it should be noted that other statutory obligations may still apply to unlicensed receiving earth stations such as the statutory prohibitions on the unauthorized reception and use of radio transmissions. *See, e.g., Deregulation Order*, 74 FCC 2d 205 at 219. Transborder Video Services, 88 FCC 2d 258 (1981).

[4] For example, we eliminated the need for applicants to file Commission Form 430, the applicant's articles of incorporation and balance sheets.

[5] Over the past five years we have received more than 6000 license applications for new receive-only earth stations. The number of receive-only applications being filed and granted has continued to grow.

[6] In the *Notice*, the Commission opened this docket and initiated this proceeding. The Commission raised issues and solicited public comment pertaining to the efficacy of our receive-only earth station licensing program. The *Deregulation Order* addressed those issues and responded to public comment by the *Notice*. This *Second Report and Order* merely terminates this proceeding by compiling and restating earlier Commission decisions which have an impact on receive-only earth station licensing. We address no new issues; respond to no public commenter. We merely close a long-standing docket.

[7] The frequency coordination process is usually performed by a firm of consulting engineers and technicians that perform various services for the earth station operator. These firms typically offer technical consulting services in addition to performing the interference analysis. Such services include spectrum planning support, frequency monitoring, market research and other application prepara-

previously recognized the effectiveness of this process in achieving its objectives and no parties have questioned its efficacy.[8]

4. This licensing program focuses on technical issues. We have generally eliminated consideration of financial and character information. In fact, our *Deregulation Order*:

> . . . in essence limits the scope of the issues that are relevant to our review of receive-only applications. Collateral issues which are not germane to these technical considerations or which otherwise reflect on the qualifications of the applicant will not generally be considered as *prima facie* evidence that a grant of the application would be inconsistent with the public interest, convenience and necessity.

Added Attractions, 77 FCC 2d 951, 955 (1980). We have also concluded that customer premises receive-only earth stations are not subject to regulation under Title II of the Communications Act.[9] Nevertheless, we find that certain current filing requirements can be eliminated.

A. Small Antenna Performance Analysis

5. In *American Broadcasting Companies*,[10], we required applicants to demonstrate the acceptability of television receive-only (TVRO) earth station facilities with antennas between 4.5 and 9.0 meters in diameter on the basis of signal quality regulations for cable television use. Specifically, an applicant for such a TVRO facility had to include a supplemental analysis of the technical performance of the television channels to be provided over the small antenna. Such a showing was required to demonstrate that the choice of antenna and receiver parameters were adequate to provide the quality of service to the public then required by our rules governing cable television systems.[11]

6. While our initial decisions established a case by case review of the choice of earth station equipment to account for different satellite signal levels through the country, we later recognized the

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tion services. The mechanics of the coordination process are set forth in Parts 21 and 25 of the Commission's Rules and Regulations. 47 C.F.R. Part 21, Subpart C, and Part 25, Subpart C.

[8] This procedure was established in Earth and Terrestrial Stations, 40 FCC 2d 395 (1973).

[9] Receive-only earth stations, like customer-premises equipment (CPE) in general, are manufactured and sold by a number of independent entities, and are classified as CPE. Memorandum Opinion and Order in the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations Second Computer Inquiry, 84 FCC 2d 50 at 70 (1980).

[10] American Broadcasting Companies, Inc., 62 FCC 2d 901, 921-923 (1977).

[11] Section 76.605, 47 C.F.R. § 76.605 (1976), then specified a required signal-to-noise ratio at the farthest drop from the cable television system headend.

ability of applicants to make such trade-offs within their own system implementation planning.[12] Since *American Broadcasting Companies*, we have also revised our rules to specify signal-to-noise criteria for cable television systems only for guideline purposes. For these reasons, no practical purpose would be served by continuing to require applicants to submit performance analyses with their TVRO applications, and we delete this requirement originally specified in *American Broadcasting Companies*.

B. Small Antenna Interference Analysis

7. In *American Broadcasting Companies, supra*, we determined that small diameter antennas could be routinely licensed if a showing were made that their use was consistent with desirable orbital spacings between domestic satellites. Our focus was on the use of parabolic antennas with diameters greater than 4.5 meters[13] for reception of television programming transmitted over domestic satellites in the 4/6 GHz bands. In the line of Commission decisions following *American Broadcasting Companies, supra*, we have also applied our small antenna policy to routinely license earth station facilities with antennas as small as 1.2 meters to receive audio or data transmissions.[14]

8. In *Reduced Orbital Spacing*,[15] the Commission adopted a reduction in orbital separation to 2° in both the 4/6 GHz and 12/14 GHz bands for the domestic fixed-satellite service.[16] This decision was based on the new earth station antenna performance standard of Section 25.209 of the Rules, as well as typical baseline transmissions received by a variety of receiving earth station facilities.[17] As part of this decision, downlink transmis-

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[12] *See, e.g.*, Public Broadcasting Service, 70 FCC 2d 1853 (1979); Western Union Telegraph Company (Muzak), Mimeo No. 30004 (released April 9, 1980).

[13] The corresponding antenna diameter for horn antennas is 4.3 meters. Antennas as small as 3 meters have been authorized where it is shown that the antenna sidelobes are significantly better than those required by the rules. *See* DeKalb Cable TV, Mimeo No. 18156 (released June 7, 1979).

[14] *See e.g.*, Muzak, note 13 *supra*.

[15] Licensing Space Stations in the Domestic Fixed-Satellite Service, 54 Rad. Reg. 577 (1983); Licensing Space Stations in the Domestic Fixed-Satellite Service in CC Docket No. 85-135, FCC 85-395 (released August 29, 1985).

[16] Orbital spacing of 2° between domestic satellites are to be implemented immediately in the 12/14 GHz bands. In the 4/6 GHz band, the transition will be more gradual due to the nature of the operation of existing earth station and satellite facilities in service there. A combination of 3°, 2.5° and 2° spacings in that band have been assigned in the interim.

[17] Extensive discussion and analyses of potential interference effects were presented in both Domestic Fixed-Satellite Service, 88 FCC 2d 318 (1981) and Reduced Orbital Spacing, *supra*.

sions are to be cross-polarized at 4 GHz. The Commission also adopted an overall orbit assignment policy for all authorized satellites.[18] As a result, the potential levels of interference caused by satellite transmissions are already defined and the actual level of any protection desired by an applicant from inter-satellite interference for small receiving earth station antennas will be achieved by the choice of receiving antenna performance selected by parties installing new receive-only earth stations. In other words, parties have the option to decide for themselves to purchase earth station equipment now, later, or not at all, based on the performance they desire. Some users may prefer to accept predictable increases in interference levels rather than pay for new or upgraded antennas, while others, wishing better performance, will select the antenna meeting their requirements. Thus, there is no need in the future to perform case-by-case reviews pursuant to *American Broadcasting Companies, supra.*

C. Assignments and Transfers of Control

9. Section 310(d) of the Communications Act[19] requires that

> No . . . station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner . . . to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

Thus, we require assignors and transferors of receive-only (R/O) licenses to file FCC Forms 702 and 704 respectively. Applications are put on public notice for 30 days. These assignment applications[20] are routinely granted a few days after the close of the public notice period as long as grant of the application is not opposed. Petitions to deny R/O assignment applications are rarely filed. This public notice process can delay, unnecessarily, the assignment or transfer transaction and thus the closing of a business transaction by an average of 45 days.[21]

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[18] Domestic Fixed Satellite Service, 94 FCC 2d 129 (1983), *recon.* FCC 84-32 (February 2, 1984), *further recon.* FCC 84-181 (May 15, 1984); Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, FCC 85-396 (released August 27, 1985).

[19] 47 U.S.C. § 310(d).

[20] For the purposes of this section the term R/O assignment application is used to describe both the assignment of license and transfer of control applications.

[21] Many licensees have circumvented this requirement by surrendering their license prior to sale of the R/O equipment and immediately applying for a reinstatement of the license in the new owners name after the sale.

10. We do not believe public notice is necessary. Section 309(b) of the Communications Act requires that public notice be given of the filing of applications for assignment or transfer of control of only certain specifically enumerated types of facilities, e.g., any broadcast, common carrier, aeronautical en route or aeronautical fixed radio station. Receive-only earth station licenses fall under none of these enumerated categories.[22]

11. Thus, we do not find utility in continuing the practice of giving public notice of the filing of R/O assignment applications. Instead, as long as the formal requirements are satisfied, we will treat all assignments and transfers of control as not requiring public notice and will only issue notice of their grant.[23]

D. 12 GHz Receive-Only Stations

12. In the frequency band 11.7 - 12.2 GHz (12 GHz), the only radio services given primary frequency allocation status are downlinks in the fixed-satellite service.[24] All other services are secondary in relation to the fixed-satellite service in this band and therefore must protect any fixed-satellite receiving facility. Because R/O facilities are licensed only to protect the facilities from harmful interference,[25] there if no reason to require a formal application and licensing procedure to protect them from harmful interference caused by transmitters licensed on a secondary basis.[26] Therefore, we will not require or accept any applications for any R/O facility in the 12 GHz band. Instead, operators are encouraged to simply provide notification directly to the secondary users of this band.[27]

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[22] *See Deregulation Order*, 74 FCC 2d 205 at 219. Also, the alien ownership restrictions of 310(b) do not apply to customer premises receive-only stations in the domestic fixed-satellite service since they are neither "broadcasting," "common carrier" nor "aeronautical . . . " stations.

[23] Note that our action on Assignments of License and Transfers of Control with respect to ancillary receive-only earth station facilities is without prejudice to Commission consideration of other services for which such applications require public notice, e.g. in the broadcasting service.

[24] *See* Section 2.106 of the Commission's Rules.

[25] Protection from adjacent satellite interference is afforded through our orbital spacing and assignment policies.

[26] Although adjacent transmitters are also licensed on a primary basis, our orbital spacing and assignment policies specify the available interference protection. *See* paragraph 8, *supra*.

[27] *See, e.g.*, Schlumberger Technology Corporation, Mimeo No. 4658, released June 7, 1984.

III. Implementation

13. We will also issue a public notice to consolidate in one notice the filing requirements which will now apply to R/O facilities.[28] No new information will be requested, and in most cases we are now requiring less information than before. The public notice will simply restate the simplified information now required for applicants to file and for us to process R/O applications.

14. The filing requirements for a new R/O station license will consist of an FCC Form 403, but associated information will be limited to a technical specification sheet[29] and the frequency coordination exhibit specified in Part 25 of the rules.[30] Also, this form will be used to handle R/O modifications of license applications. Assignments will continue to be filed on FCC Form 702, transfers of control will continue to be filed on FCC Form 704, and renewals will continue to be filed on FCC Form 405.

15. The form of the license for an R/O earth station is essentially the same form as the license for a transmit/receive earth station except the R/O license defines interference protection rather than scope of authorized operations. The license term is now ten years.[31] Upon expiration of a current license, receive-only earth station operators must file applications for renewal of their license for an additional ten year term. If the license is not renewed, the station acquires the status of an unlicensed facility.

16. We will also continue to process applications requesting major technical modification of licensed R/O facilities only to the extent that changes are made to the scope of interference protection. However, we will not process requests for minor modifications to existing licenses that do not change the degree of the agreed upon terrestrial interference protection, but will simply

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[28] The public notice will supersede the procedures for receive-only earth station applications specified in our *Public Notice* of August 8, 1975, FCC 75-932, and subsequent amending public notices: *Public Notice* of July 5, 1978, Mimeo No. 2625; *Public Notice* of August 10, 1978, Mimeo No. 6044; *Public Notice* of January 9, 1979, Mimeo No. 11345; *Public Notice* of October 3, 1979, Mimeo No. 7099; *Public Notice* of October 25, 1979, Mimeo No. 22622; and *Public Notice* of July 8, 1981, Mimeo No. 001971.

[29] This will include statements as to whether the application is or is not a minor environmental matter under § 1.1305 of the Rules, whether notification to the Federal Aviation Administration (FAA) is or is not required under § 17.7 of the Rules, etc.

[30] *See* Section 25.203 (c), 47 C.F.R. § 25.203 (c).

[31] Report and Order in the Matter of Common Carrier and Satellite Licensing Procedures Pursuant to the Communications Amendment Act of 1982, FCC 83-276 (released June 9, 1983).

file any such submissions in the station file for public information.

17. The Commission's rules and regulations offer interference protection for R/O stations through the frequency coordination and licensing process.[32] That process requires that the pertinent parameters of the R/O facilities, whether for the initial or modified license, are made available for public comment for 30 days so that potentially affected operators can ensure that the coordination procedure thas in fact been successfully completed for the facilities or services to be licensed. In issuing the licenses for receive-only earth stations, the Commission specifies various particulars of operation. Such minimum parameters must, of course, be specified in order to define the interference protection afforded by the license.[33] However, we believe it useful to clarify the effects and impact of certain items specified in receive-only licenses and to remove various restrictions currently imposed in such licenses which are inconsistent with the pertinent Commission actions.

18. We will continue to specify the particulars of operations for the basic emissions and frequency band coordinated. We will also continue to specify the range of azimuths, range of antenna elevation angle and range of satellite longitudes for which coordination has been completed with terrestrial facilities as basic elements of the frequency assignment. On the other hand, points of communications will be specified only for reference purposes because all possible points of communications are defined in the particulars of operation section (except for non-U.S. satellites). Furthermore, we will continue to specify the maximum antenna height and the site elevation. These parameters are included to fulfill our obligations under Part 17 of our rules. Specifications of make and model of the R/O antenna should be specified only for the most sensitive receiving facility being protected. A remote control point will be specified only if the applicant wishes to indicate that the operating center or studio where employees are normally located is far from the receiving antenna site specified in the license. The numbered provisions generally recite limitations to the R/O licenses specified in Commission orders. This action we take today supersedes all earlier restrictions contained in R/O facility licenses other than those directly related to defining the

[32] Failure to respond to a coordination request from a terrestrial applicant constitutes acceptance of any interference that might be caused to a receiving earth station. *See* Sections 25.203(c) and 21.100(d) of the rules.

[33] Such items include assigned frequency band, range of satellite locations, elevation angles and azimuth, size and gain of antenna, maximum antenna height and site elevation.

parameters of interference protection afforded the receive-only earth station.

IV. Conclusion

19. Today, we are further streamlining our licensing procedure for R/O earth stations. This action will ease the administrative burden on both the public and the Commission staff and reflects simplifications in the administrative aspects of this procedure resulting from policy determinations in other Commission proceedings.

20. We expect all applicants to cooperate fully with these streamlined requirements. We will not accept or process applications which do not conform to these minimal requirements. We also stress that this action applies solely to domestic satellite receive-only earth stations.

21. Because the benefits of these procedural rule changes would be made available to the public immediately, and these changes in policy relieve certain restrictions, this *Second Report and Order* shall be effective within less than thirty days from the time its summary is published in the Federal Register. 5 U.S.C. § 553(d)(1).

22. Accordingly, IT IS ORDERED that the requirements of receive-only earth station applicants specified in paragraphs 6 and 8 ARE ELIMINATED and the applications procedures specified in paragraphs 11, 12 and 16 above ARE ADOPTED.

23. IT IS FURTHER ORDERED that these procedures ARE EFFECTIVE May 19, 1986.

24. IT IS FURTHER ORDERED that the proceedings in CC Docket No. 78-374 ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Advertising
Commercials, See Advertising

FCC denied petitions for reconsideration of the Commission's action in its television deregulation *Report and Order* deleting commercial guidelines for commercial TV licensees. Marketplace forces are sufficient to determine appropriate levels of commercialization.
—*Television Deregulation*
MM Docket No. 83-670

Community, Ascertainment of Needs

FCC denied petitions for reconsideration of the Commission's action in its television deregulation *Report and Order* eliminating formal ascertainment requirements for commercial TV licensees. Formal ascertainment is not statutorily compelled and is no longer a necessary or appropriate device to assure programming in the public interest.
—*Television Deregulation*
MM Docket No. 83-670

Notice
Notice, Sufficiency of

FCC rejected the contention of petitioners for reconsideration that the Commission's action deleting the "long" (audit) renewal form for television licensees was taken without sufficient notice. The Commission's reference in the *Notice of Proposed Rule Making* in this proceeding to reassessing its "information needs" in light of its deregulation proposals provided adequate notice of the subject matter to sustain action upon the long form audit.
—*Television Deregulation*
MM Docket No. 83-670

Programming

FCC denied, as unpersuasive and repetitive, petitions for reconsideration of the Commission's action in its televison deregulation *Report and Order* eliminating the nonentertainment programming guidelines for commercial TV licensees.
—*Television Deregulation*
MM Docket No. 83-670

Program Logs, Public Inspection of
Public Inspection of Local Station File

FCC denied petitions for reconsideration of the Commission's action in its television deregulation *Report and Order* eliminating a comprehensive program logging system for commercial TV licensees. However, the existing illustrative issues/programs list requirement was deleted and replaced with a "significant issue treatment" list requirement. Licensees will now be required to list, each quarter, programs that provided the station's "most significant" treatment of community issue.

—*Television Deregulation*
MM Docket No. 83-670

FCC 86-223

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations	MM Docket No. 83-670

MEMORANDUM OPINION AND ORDER

Adopted: May 1, 1986; Released: May 28, 1986

BY THE COMMISSION:

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INTRODUCTION

1. Before the Commission for its consideration are the following: (1) "Petition for Reconsideration of Telecommunications Research and Action Center; Action for Children's Television; Black Citizens for a Fair Media; Chinese for Affirmative Action, Committee for Community Access; National Association for the Advancement of Colored People; National Association for Better Broadcasting; National Council of La Raza; and Citizens Communication Center" (hereinafter "TRAC"); and (2) "Petition for Reconsideration of Henry Geller and Donna Lampert" (hereinafter "Geller"). Each of these petitions seeks reconsideration and/or clarification of our decision in the *Report and Order* in the above-captioned proceeding.[1] Oppositions to and comments on these petitions were filed by the National Association of Broadcasters ("NAB") and the National Telecommunications and Information Administration ("NTIA"). A reply to these oppositions was filed by TRAC.

2. In the *Report and Order*, we determined that the public interest would be served by eliminating guidelines relating to non-entertainment programming and amounts of commercial matter presented by commercial television stations and deleting our rules relating to formalized community ascertainment and the maintenance of comprehensive program logs by such stations. These conclusions were reached after an exhaustive review of the record, including our own independent study of the economic incentives for the delivery of video programming. We found that market incentives generally serve to ensure the presentation of programming that responds to community needs. Additionally, we noted that elimination of the above mentioned rules provides television broadcasters with increased freedom and flexibility in meeting the changing needs of their communities. In reaching these conclusions, we made it clear that an obligation to present programming that responds to community issues still exists. We also determined that licensees would be required to maintain a quarterly issues/programs list as a means of providing the public and the Commission with the information necessary to monitor

[1] *Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076 (1984) (hereinafter "*Report and Order*").

licensees' performance under the new regulatory scheme.

3. In its request for reconsideration of the *Report and Order*, TRAC generally contends that "the Commission's rationales in support of these conclusions are based on faulty premises" and that our new regulatory approach negates "licensee accountability."[2] Geller urges reconsideration of the *Report and Order* because the decision "conflicts with statute, recent judicial holdings, and several relevant Commission decisions."[3] Both petitioners advance a series of specific arguments in support of their requests. In the interest of clarity, these various arguments will be reviewed and discussed in the same order that the major issues to which they relate were addressed in the *Report and Order*. Contentions relating to the program guidelines will be considered first, to be followed by those issues raised relating to ascertainment, the commercial guidelines, program logs, and elimination of the long form audit. To the extent parties seek clarification as to certain aspects of the Commission action, these matters will be considered in the discussion when appropriate.

DISCUSSION

Program Guidelines

4. *Prerequisites for Deregulation.* TRAC maintains that the existence of a television market similar in nature to the "radio model" — a market populated with numerous fungible outlets and characterized by narrowcasting — is essential to our decision to deregulate. Yet, TRAC asserts, the current television market is not comparable to that in radio. Rather, the television marketplace is typified by fewer outlets and broadbased programming. In this regard, TRAC argues that the television market is unique and that the Commission improperly disregarded this fact in its analysis by including various other "fledgling" video technologies with television broadcasting as part of a larger "video marketplace." Accordingly, TRAC concludes that our decision is ill-founded and should be reconsidered.

5. We find TRAC's arguments unpersuasive. Petitioner has presented no support for its position that narrowcasting is a necessary condition to deregulation and nothing in logic compels such a conclusion. Moreover, neither our decision in this proceed-

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[2] "Petition for Reconsideration," filed by Telecommunications Research and Action Center, at p. 3 (hereinafter "TRAC Petition").

[3] "Petition for Reconsideration," filed by Henry Geller and Donna Lampert, at p. 1 (hereinafter "Geller Petition").

ing nor our earlier decision deregulating radio services presumed, as TRAC appears to contend, the existence of narrowcasting or the presence in each broadcast market of multiple media voices. On the contrary, our decision in this proceeding examined the characteristics of the current over-the-air television market — a market which is essentially not narrowcast in nature — and concluded that existing market forces rather than regulatory requirements would generally assure the presentation of appropriate, responsive program service. Accordingly, we deleted the quantitative program guidelines, retaining only a more flexible issue-responsive programming obligation. Similarly, while our decision in *Deregulaton of Radio* clearly took account of the narrowcast nature of most radio markets, it also deregulated small radio makets where narrowcasting had not developed.[4]

6. To the extent that the *Report and Order* did refer to narrowcasting or the "radio model" in connection with television markets, it did so only to reflect our observation that television could evolve in that direction as new video technologies emerge, and to note that such evolution would simply further guarantee that there would continue to be a market demand for nonentertainment programming.[5] We remain convinced that as the video marketplace continues to expand, it could well develop along "narrowcast" lines. Neither our supposition in this regard, however, nor its validity in terms of real market conditions, is or was an essential part of our analysis.

7. In essence, the Commission, in eliminating the programming guideline, replaced a system where each broadcaster was, in effect, compelled to present prescribed amounts programming in each of the traditional categories, with a more flexible system, where individual broadcasters may be more directly responsive to existing market forces. These market forces, and the ensuing reaction to these forces, will vary with the type or market. The "radio model" — the narrowcast market — is one such reaction. Since market trends now prevailing in commercial television are different from those in radio, the reaction to these trends is distinct as well, with most television stations evidencing broad-based programming characteristics. Despite this significant difference between the typical program service of an individual radio and television station, the availability in radio and television markets of appropriate program service on a market-wide basis is

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[4] *Report and Order* at n.38.

[5] *Id.* at 1086. *See also Report* in Gen. Docket No. 84-282, 50 Fed. Reg. 35418 (August 30, 1985).

not substantially different. One strength of the issue-responsive programming approach is that it accommodates such wide differences in the program service of individual stations, thus according licensees maximum freedom to adjust to varying economic conditions, yet it retains a regulatory structure to ensure that essential service is provided in any given broadcast market. In its opinion generally affirming the Commission's radio deregulation decision, the Court of Appeals for the District of Columbia Circuit cited with approval this change to a more flexible policy, stating that "the Commission's shift in policy is adequately explained and sufficiently supported by economic analysis and logical argument".[6]

8. *Purposes and Effects of the Programming Guideline.* TRAC also contends that the Commission misrepresented the purposes of the non-entertainment programming guidelines in determining to eliminate them. TRAC states "the guidelines were never intended to establish the desired level of licensee performance";[7] rather, they fixed a level of programming service by a licensee below with further inquiry by the Commission was triggered in determining whether grant of a renewal application would serve the public interest. Thus, TRAC maintains, the Commission's reliance upon the success of current market forces in eliciting essential program service as a basis for eliminating the guidelines in mistaken because the purpose of the guidelines is to serve as a "safety net" — to protect against potential market failures in public interest program service when they do occur. Similarly, TRAC contends that the Commission erred in asserting that broadcasters have improperly relied upon the guidelines as a quantitative goal which, if exceeded, would provide insulation from challenge at renewal. The guidelines, TRAC maintains, were not so viewed by licensees.[8] Accordingly, the Commission's

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[6] *Office of Communications of the United Church of Christ v. FCC*, 707 F.2d 1413, 1435 (D.C. Cir. 1983) [hereinafter "*UCC III*"].

[7] TRAC Petition at p. 7.

[8] Geller, on the other hand, emphasizes his view that some degree of reliance upon the satisfaction of a quantitative program standard is essential in the renewal context. However, much of Geller's analysis in this regard relates to quantity in the context of comparative renewals. Given the stated scope of this proceeding and the pendency of a proceeding specifically addressed to the comparative renewal process, such analysis is not properly considered here. *See Report and Order* at 1095; *Notice of Inquiry* in BC Docket No. 81-742, 88 FCC 2d 120 (1981) and *Further Notice of Inquiry* in BC Docket No. 81-742, 47 Fed. Reg. 46117 (October 15, 1982). To the extent that Geller maintains that we have improperly eliminated all concern with quantity in the uncontested renewal context, his argument is erroneous. The *Report and Order* determined only that our programming guidelines, with their exclusive reliance on specific

reliance in eliminating the guidelines on the unintended substantive implications of the program category percentages, was misplaced.

9. While we agree with TRAC that the existing guidelines were not meant to denote any optimal level of program performance, we take issue with their assertion that broadcasters have not been misled by the quantitative character of the guidelines. The record in the proceeding indicated that broadcasters could perceive, and some had perceived, the guidelines as an appropriate measure of performance sufficient to satisfy a licensee's traditional programming responsibilities. In any event, the singular emphasis of the guidelines on quantitative standards plainly carried with it the potential to mislead, while "[by] restating the programming obligation in uncontested renewal proceedings in terms of issue-responsive programming, [broadcasters] are provid[ed] with a more appropriate description of their programming obligation."[9] Our determination in this regard remains uncontroverted by the arguments raised on reconsideration.

10. TRAC's related concern that the "safety net" purpose of the guidelines was not recognized by the Commission is also misplaced. Contrary to TRAC's assertion, elimination of the guidelines in no way contravenes the notion that broadcast licensees remain obliged to operate in the public interest. The Commission merely determined that the marketplace can generally be relied on to adequately protect the presentation of a variety of programming defined by the guidelines and that, if there have been no complaints and a licensee complies with the issue-responsive obligation, a presumptive judgment can be made in the uncontested renewal context that the licensee has met its public interest obligations. This presumption in no way undermines the central regulatory and statutory "safety net" protecting the public. In any event, as we noted in the *Report and Order*,

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quantities of certain types of programming, were both unnecessary and misleading. Our decision, however, cannot reasonably be read to have rendered quantity irrelevant. As we stated in the *Report and Order* "[the] basic responsibility to contribute to the overall discussion of issues confronting the community is non-delegable duty for which each licensee will be held individually accountable." *Report and Order* at 1094. At the same time, it is clear that failure to present precise amounts of programming alone is not an acceptable means of making a public interest determination. *See Report and Order* at 1093; *UCC III*, 707 F.2d at 1433 (" . . . the Commission adopts a logical stance in stressing the importance of other factors besides quantity. . . . "); *National Black Media Coalition v. FCC*, 589 F.2d 578, 581 (D.C. Cir. 1978) (" . . . quantitative guidelines would limit editorial discretion without any guarantee of improved service.")

[9] *Report and Order* at 1090.

"remaining procedures are more than adequate to bring to our attention the failings of any particular licensee."[10] Thus, the presumptive judgment that licensees in the uncontested renewal context satisfy the issue-responsive obligation, is rebuttable. Citizen complaints and petitions to deny remain available as monitoring mechanisms. The individual licensee has the non-delegable duty to contribute to the overall discussion of issues confronting the community. An allegation that this obligation has not been met, as well as an allegation that a licensee has failed to address an issue of particular relevance to a significant segment of the community, may be raised even where some issue-responsive programming has been provided.[11]

11. *Scope of the Issue-Responsive Programming Obligation.* Geller argues that the Commission's statement of a broadcaster's public service programming obligation as requiring the presentation of issue-responsive programming is too narrow, noting that under such a restrictive definition, "broadcasters will be discouraged from presenting much programming that will greatly benefit the public, since they will receive no credit at renewal for broadcasting the excluded types."[12] In this connection, Geller questions why material such as an instructional program for children, an "ordinary" religious program, or a straight newscast cannot be included within any new definition of public service programming. Similarly, TRAC notes that while a demand for news may be supplied by the marketplace, there may not be such a demand for public affairs of local programming — types of programming which are no longer distinguished under the new "issue-responsive" obligation.

12. Petitioners generally maintain that the role of the traditional program categories is not clearly defined in the new system. Geller adds that the existence of the traditional categories of local and informational programming is essential to a determination concerning licensee renewal. TRAC also questions whether the elimination of program categories signifies that a licensee may avoid programming of significance to particular groups within a community, such as minorities, by responding to issues which are of importance to that community as a whole. Both petitioners express concern that the issue-responsive program obligation does not properly account for the special needs of children and duty of broadcasters to address programming to this

[10] *Id.* at 1091.
[11] *Id.* at 1094.
[12] Geller Petition at pp. 1-2.

audience.

13. Finally, TRAC also expresses concern with respect to the Commission's determination that television stations may look to other stations in their market in determining what issue to address, provided that their reliance on other stations is reasonable. TRAC asserts that it is not "even clear whether the issue-responsive programming has to be actually broadcast by the other station in order to constitute reasonable reliance."[13] TRAC contends that this lack of clarity and definition undermines the concept of individual licensee accountability and should be remedied.

14. We disagree with Geller's assertion that issue-responsive programming is too narrowly defined.[14] First, it should be noted that the scope of issue-responsive programming, as articulated in the *Report and Order*, is potentially quite broad in terms of program types. We explicitly indicated, for example, that programming in any of the categories contained in the *1960 Programming Statement* could be characterized as issue-responsive.[15] Second, we recast the scope of our regulatory concern in the programming area in issue-responsive terms because a broader regulatory requirement was not necessary and, given the inherently suspect nature of government intrusion in program content matters, was undesirable. In this regard, we found generally that market demand was the primary impetus for the presentation of the traditional categories of nonentertainment programming. Moreover, we determined that programming not characterizable as issue-responsive, but still valuable to the public, is also demand-based and will therefore continue to be presented without the need for regulatory intervention. In any event, should the market prove not to support valuable programming that does not fall into the issue-responsive category, the Commission may consider the matter in an appropriate rulemaking proceeding.[16]

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[13] TRAC Petition at p. 12.

[14] To the extent that Geller's arguments include a concern for the scope of programming considered by the Commission in the context of comparative renewal proceedings, we express no opinion, for the reasons set forth above (note 8, *supra*), on the merits of his contentions.

[15] *Report and Order* at 1092.

[16] This is directly analogous to the approach the Commission has taken in the area of children's programming, where the reliability of market forces has been uncertain. While the Commission has recently found that the video marketplace now generally supports the presentation of children's programming, it remains an express part of a licensee's general public interest obligation to consider the program needs of the child part of its audience and be ready to demonstrate its attention to these needs. *Report and Order* in Docket No. 19142, 96 FCC 2d 634 (1984), *aff'd Action for Children's Television v. FCC*, 756 F.2d 899 (D.C.

We continue to believe that, in the context of uncontested renewal proceedings, this revised regulatory scheme properly balances our concern for minimizing government intrusion in program matters and our interest in ensuring appropriate program service in the public interest. Furthermore, we note that virtually the same points as advanced here by petitioners were raised in connection with our radio deregulation decision and were considered in detail and rejected by the Commission and by the Court of Appeals in *UCC III*.[17]

15. TRAC's specific concern that programming previously included within the program guidelines, such as local programming, will no longer be presented under the new system is clearly unwarranted. The Commission did note in the *Report and Order* that certain figures presented to it during the initial stages of this proceeding indicated a decline in the percent of time devoted to local programming over the last several years.[18] While the approximately 2% decline so documented was not insignificant, we noted that local programming figures nonetheless remained substantially above the guideline percentage and that the absolute amount of local programming increased.[19] Moreover, the Commission pointed out that coverage of local issues does not necessarily have to come from locally produced programming.[20]

16. TRAC's concern relating to programming geared toward minorities is also unwarranted. Deletion of the program guidelines does not affect the obligation that exists in this area. The Commission explicitly affirmed in the *Report and Order* that licensee may not ignore the strongly felt needs of a significant

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Cir. 1985).

[17] *See* 707 F. 2d 1413, 1430.

[18] *Report and Order* at 1082.

[19] In this connection, the results of a recent survey conducted by the RTNDA on the effects of deregulation in both the radio and television context are noteworthy. In the case of radio, the results indicated that deregulation had had no clear effect on the amount of local programming presented. While some stations reported some decreases in the amount of local public affairs programming, stations also reported increases in the amount of locally originated news programming. Because of the contemporaneous nature of the survey and the deregulation of television, results for television are in the form of projections. Most of those surveyed by RTNDA projected that there would generally be no effect upon the presentation of local programming in the wake of deregulation and many of those projecting an effect foresaw an increase in such programming. Radio-Television News Directors Association, *Communicator* (May, 1985).

[20] *Report and Order* at fn. 28. *See also UCC III*, 707 F.2d at n.54 ("As long as the Commission requires licensees to provide programming — whatever its source — that is responsive to their communities, § 307(b) is satisfied.")

segment of its community in making its programming decisions.[21] We have recognized that program responses to the needs of such minority audiences may vary with the nature of the market,[22] need not be proportional to the minority audience served,[23] and, with respect to the programming of an individual station, may be determined after consideration of the service of other stations in the market.[24] None of these aspects of the service obligation, however, is novel and each has been explained by the Commission as well as generally approved by the courts.[25] Moreover, none of these considerations, nor any statement in the *Report and Order*, suggests, as TRAC appears to contend, that a licensee can entirely avoid its duty to meet the needs of significant minority audiences by programming to the general needs of its community.

17. Finally, in meeting their basic obligations, we reiterate that licensees may look to the programming of other stations in their markets.[26] TRAC questions whether the programming of a market station must actually be broadcast before it may be relied upon by another market station in the context of satisfying the latter station's issue-responsive programming obligations. In our view, such "other station" programming would ordinarily have to be actually broadcast if the station relying upon it hopes to meet the "reasonable reliance" standard enunciated in the *Report and Order*,[27] particularly if such reliance extends over any appreciable period of time. The standard admits, however, of the possibility that a station could show reasonable reliance *with respect to a particular issue* even in the absence of actual broadcast by the other station.[28] Contrary to TRAC's contention, individual licensee accountability is retained even where reliance on another station is permitted because the responsibility of each licensee to contribute to the overall mix of issue-responsive programming is a

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[21] *See* ¶10 and n.11, *supra*, and particularly the reference in that part of the *Report and Order* cited there to *Stone v. FCC*, 466 F.2d 316 (D.C. Cir. 1972).

[22] Larger markets, with a greater availability of other program sources, may result in more specific programming responses. Markets with lesser amounts of program sources may result in broader responses.

[23] *Report and Order* at 1094.

[24] *Id.*

[25] *See, e.g., Stone v. FCC*, 466 F.2d at 328, where the court stated: "there is no requirement that a station devote twenty percent of its broadcast time to meet the need expressed by twenty percent of its viewing public"; *Report and Order* in BC Docket No. 79-219 (*Deregulation of Radio*), 84 FCC 2d 968, 991-2 (1981), *remanded on other grounds, UCC III*, 707 F.2d 1413 (D.C. Cir. 1983).

[26] *See Report and Order* at 1094.

[27] *Report and Order* at 1094-95.

[28] *See Report and Order* in BC Docket No. 79-219 (*Deregulation of Radio*), *supra* n.25.

fundamental duty for which licensees will be held individually accountable.

Ascertainment

18. TRAC contends that the Commission exceeded its authority by eliminating the basic ascertainment obligation for television licensees. In this connection, TRAC asserts that the generalized statutory obligation to broadcast in the public interest requires a licensee to ascertain local community concerns and that the Commission cannot, therefore, dispense with the basic ascertainment obligation. Moreover, TRAC argues that our action eliminating formal ascertainment procedures deprives the Commission and the public of the means of monitoring compliance with this underlying ascertainment obligation and was thus ill-advised and should be reconsidered. Finally, TRAC expresses its concern that without ascertainment the needs and interests of insular minorities will be ignored or overlooked by broadcasters.[29]

19. TRAC's apparent contention that an underlying ascertainment duty distinct from the responsive programming obligation of licensees is mandated by the Communications Act is not persuasive.[30] The language of Sections 307, 308, and 309 of the Act does not include any reference to a requirement to ascertain. Moreover, the courts have pointed out that "the Communications Act in no way speaks to the procedures by which licensees must identify the major issues confronting their listenerships."[31] Ascertainment, then, was not a necessary result of the statutory scheme of the Communications Act; rather, it was the result of a deliberate yet discretionary policy decision by the Commission that, under the conditions then existing in broadcasting, ascertainment represented a possible means of promoting program service in the public interest that would also limit Commission involvement in program decision making.[32] The process, however, was not successful. We carefully explained the reasoning behind our determination in the *Report and Order* that this policy choice was no longer appropriate:

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[29] TRAC's concern for broadcasters' responsiveness to the needs of minorities in connection with ascertainment requirements is analogous to its concern expressed in connecting with the programming guidelines. For the same reasons as in the programming context, we are persuaded that TRAC's concern in the ascertainment context is also ill-founded. *See* ¶16, *supra*. We do not believe, therefore, that further discussion on this matter is necessary.

[30] TRAC Petition at p. 15.

[31] *UCC III* at 1436.

[32] Our discretion in such matters is quite broad. *See UCC III*, 707 F.2d at 1436. *See also FCC v. WNCN Listeners Guild*, 450 U.S. 583 (1981).

> We do not believe that the benefits of the ascertainment requirements justify the costs of this procedure. . . . Licensees, like other citizens, are exposed to newspapers, newsletters, town meetings and other community activities, all of which provide indications of those issues that are important to the community. Broadcasters do not operate in a vacuum and, as discussed above, it is in the economic best interest of the licensee to stay informed about the needs and interests of its community. Given these considerations, as well as the continuing obligation of all licensees to provide issue-responsive programming, we believe that ascertainment requirements can now be abandoned with little or no risk of adverse effects on the programming performance of television licensees.[33]

TRAC has advanced no argument or evidence which undermines this rationale and we find, therefore, no warrant in its petition to alter our decision on this issue.[34]

Commercial Guidelines

20. TRAC next states that the Commission failed to consider several important factors in eliminating the commercialization guidelines. First, TRAC maintains that the purpose of the commercialization guidelines was miscast by the Commission in the *Report and Order*. The guidelines, they assert, were designed to limit the number of commercials, not to define an optimum level of commercialization. In TRAC's view "the Commission's evidence that broadcasters generally do not exceed the guidelines is inapposite to its ability to police abuses when they occur."[35] TRAC also states that there is no merit to the suggestion that the guidelines violate the First Amendment.

21. TRAC further asserts that the Commission has eliminated "all barriers to overcommercialization in children's programming in the face of evidence that the marketplace fails to respond to children's needs. . . . "[36] In this connection, TRAC states that the Commission has failed to address the licensee's special obligation to exercise caution in the presentation of commercials for children's television. NAB, in responding to these petitions, also sought clarification regarding the effect of the elimination of the

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[33] *Report and Order* at 1100-01.

[34] While our decision did emphasize the responsiveness of a licensee's programming and not the methodology utilized in reaching particular programming decisions, it did not suggest that methodology might never be a relevant concern. As we noted in the *Report and Order*: "[the] focus of our inquiry in the petition to deny context can be expected to be whether the challenged licensee acted reasonably in choosing the issues it addressed in its programming." *Report and Order* at 1094. Methodology could well be germane in such a reasonableness determination.

[35] TRA Petition at p. 19.

[36] *Id.*

commercial guideline upon children's advertising policies.

22. TRAC's contention that the Commission misunderstood the purpose behind its own commercial guideline is directly analogous to its similar contention concerning our deletion of the programming guidelines. As in that context, TRAC's assertion here that the commercial guideline was not meant to define an optimum amount of commercial time is correct, but this fact in no manner contravenes our rationale for eliminating it. The Commission essentially determined that market forces, and not government regulation, were the decisive and reliable factors in determining the appropriate amount of commercial time in television programming. The guideline, thus, served neither the purpose of optimizing commercial time nor serving as a "safety net" for abuse, but rather amounted to an unnecessary restriction upon the discretion of licensees.[37] We believe that the reaction of the marketplace — the fact that viewers will not watch and advertisers will not buy time if too many commercials are presented — adequately protects the public interest in this context.[38] TRAC has advanced nothing beyond conclusory assertion to the contrary.

23. In response to NAB's request for clarification, the *Report and Order* did eliminate all prior policies relating to the amount of commercial advertising time in television programming. This includes our prior pronouncement regarding commercial time in children's programming.[39] The Commission has subsequently noted and relied upon this determination.[40] Elimination of this

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[37] In making this determination, we noted that commercial speech has been accorded significantly increased First Amendment protection in recent years. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). As a matter of policy, the Commission, in making its public interest determinations, is obligated to consider the potential effect upon First Amendment principles. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

[38] The court generally approved of this analysis in affirming the Commission's decision eliminating a similar rule in radio. *UCC III* at 1438.

[39] The overall commercial guidelines existed in the rules only as a limitation on the authority delegated from the Commission to the staff. These delegations did not address separately commercial practices during children's programs. The children's guidelines were part of the deference to industry self-regulation, to be reviewed on an industry wide basis, contained in the *Children's Television Report and Policy Statement* (Docket No. 19142), 50 FCC 2d 1 (1974); *reconsid. denied*, 55 FCC 2d 691 (1975). Subsequent to this decision, the Federal Trade Commission also terminated a voluminous proceeding after finding that it did not have an adequate basis for formulating a supportable and workable rule governing children's television advertising. *See FTC Termination of Rule Making Proceeding in the Matter of Children's Advertising*, 46 Fed. Reg. 48710 (October 2, 1981).

[40] *Memorandum Opinion and Order* (In re Complaint of Action for Children's Television), 58 RR 2d 61, 65 (1985).

policy is consistent with the Commission's general de-emphasis regarding quantitative guidelines engendered in the *Report and Order.* Moreover, the Commission has consistently noted the importance of advertising as a support mechanism for the presentation of children's programming.[41]

Program Logs

24. Petitioners next attack the elimination of the comprehensive program logging requirements. Both petitioners point to industry sources which have indicated that elimination of the present requirements will not result in significant cost savings and that existing logging obligations are not burdensome to licensees. The petitioners assert that without a substantial relief in burden, elimination of program logs is not justified.

25. Petitioners also question the availability of sufficient information to review licensee performance in the absence of comprehensive program logs. Geller asserts that the Commission cannot make an adequate public interest finding at renewal. Geller also asserts that the public cannot properly be relied upon to monitor licensee compliance, while both petitioners maintain that, if the public is to be relied upon, program logs are essential. The new issues/programs list, it is contended, does not provide any comprehensive account of public service programming and is an insufficient information source for the public. In addition, Geller finds Commission reliance upon alternative sources of program information insufficient, asserting that the information provided by these alternative sources does not specifically and directly address the remaining areas of Commission concern.

26. The arguments raised by petitioners essentially restate similar concerns raised in connection with the initial program record keeping requirements adopted for commercial radio station licensees in our radio deregulation proceeding. In addressing these concerns in the radio context, the Commission fashioned an illustrative isssues/programs list rule that required licensees to document programming addressed to at least 5 to 10 community issues during each quarter.[42] In a recent decision, the Court of

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[41] The Commission has recently reaffirmed this belief. *Memorandum Opinion and Order* (denying RM-4830), 58 RR 2d 90 (1985). We also note that, while quantity is no longer a consideration in and of itself, other aspects of the 1974 *Children's Television Report and Policy Statement* more directly addressing the central concern of deceiving the child viewer remain intact. These include the use of adequate techniques for separation of program and commercial material, as well as the host selling policy.

[42] *Second Report and Order* in BC Docket No. 79-219, 96 FCC 2d 930 (1984).

Appeals for the District of Columbia Circuit vacated this record keeping requirement and remanded the proceeding to the Commission for development of a rule more attuned to needs of potential petitioners to deny.[43]

27. We have carefully reviewed the court's opinion and reviewed our own information needs and are today adopting, in a separate opinion,[44] a revised record keeping rule for radio station licensees. The revised rule requires a licensee, on a quarterly basis, to compile "a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period."[45] For the reasons advanced in our opinion adopting the above requirement for radio licensees, we believe an identical rule should be adopted for television station licensees. Such a rule addresses petitioners' contentions and the concerns raised by the court, yet avoids unnecessary paperwork burdens for licensees. The pertinent rule is amended by the attached Appendix.

Long Form Audit

28. Finally, TRAC contends that inadequate notice and opportunity for comment were given by the Commission in eliminating the long form renewal for commercial television licensees. We disagree.

29. Adequate notice is provided under § 553 of the Administrative Procedure Act[46] when the Commission clearly puts interested persons on notice of the general subject matter and issues involved in a given proceeding. The Commission need not precisely identify every proposal upon which ultimate action is taken.[47] The general context of this whole proceeding and the Commission's reference in the *Notice* to its "information needs" in the context of its proposal to delete the subject processing guidelines and policies provide adequate notice to sustain our action upon the long form, and we so stated in the *Report and Order*.[48] Parties were thus on notice take a general assessment of

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[43] *Office of Communication of the United Church of Christ v. FCC* ("UCC IV"), No. 84-1239, Slip Op. (D.C. Cir. December 20, 1985).

[44] *Memorandum Opinion and Order* in BC Docket No. 79-219, FCC 86-222 (adopted May 1, 1986).

[45] *Id.* at Appendix.

[46] 5 U.S.C. § 553.

[47] *See, e.g., Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977); *California Citizens Band Ass'n, Inc. v. United States and FCC*, 375 F.2d 43 (9th Cir. 1967).

[48] *Report and Order* at 1111 and n.112.

information requirements would take place.[49] Finally, as a general matter, once notice is given that an assessment of specific underlying rules is to take place, the potential for amendments to those forms which are directly related to those underlying rules should be clear.[50]

30. Accordingly, IT IS ORDERED, That the Commission's Rules ARE AMENDED, effective June 27, 1986, as described above and as set forth in the attached Appendix.

31. IT IS FURTHER ORDERED, That the petitions for reconsideration filed by Henry Geller and Donna Lampert, and by Telecommunications Research and Action Center, *et al.*, ARE DENIED.

32. IT IS FURTHER ORDERED, That the Secretary SHALL CAUSE a copy of this *Memorandum Opinion and Order* to be printed in the FCC Reports.

33. Authority for the action taken herein is contained in Sections 4(i) and (j) and 303 of the Communications Act of 1934, as amended.

34. For further information concerning this *Memorandum Opinion and Order*, contact Freda Lippert Thyden, Mass Media Bureau (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

47 CFR Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

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[49] It is worth noting, in terms of awareness of our intention to revise the audit form, that the Commission had undertaken a similar assessment of its information needs in the area of radio broadcasting and had, as a result, eliminated the long form for radio. *Report and Order* in BC Docket No. 80-253 (*Radio Broadcast Services: Revision of Applications for Renewal of License of Commercial AM, FM, and Television Licensees*), 46 Fed. Reg. 26236 (May 11, 1981), *aff'd, Black Citizen's for A Fair Media v. FCC*, 719 F.2d 407 (D.C. Cir. 1983).

[50] It should also be noted that forms are inherently procedural in nature and that notice requirements surrounding their amendment are therefore not as exacting as in cases where substantive rights are at issue. *See American Meat Institute v. Bergland*, 459 F. Supp. 1308 (D.D.C. 1978) [fact that action may have some substantive effect does not render it not "procedural"]. *Equal Employment Opportunity Comm. v. National Cash Register Co.* 405 F. Supp. 562 (N.D. Ga. 1975).

2. 47 CFR 73.3526 is amended by revising paragraph (a)(8) to read as follows:

Section 73.3526 Local public inspection file of commercial stations.

(a) * * *

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(8) For commercial TV broadcast stations, every three months a list of programs they have provided the station's most significant treatment of community issues during the preceding three month period. The list for each calendar quarter is to be filed by the tenth day of the succeeding calendar quarter (*e.g.*, January 10 for the quarter October–December, April 10 for the quarter January–March, etc.). The list shall include a brief narrative describing what issues were given significant treatment and the programming that provided this treatment. The description of the programs should include, but is not limited to, the time, date, duration and title of each program in which the issue was treated.

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